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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF MORTGAGE

BY
GEORGE W. KIRCHWEY
113
NASH PROFESSOR OF LAW IN COLUMBIA UNIVERSITY

PARTS I., II., AND III.

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SELECT CASES

AND OTHER AUTHORITIES

ON THE LAW OF MORTGAGE.

BOOK I.

INTRODUCTION: PROPERTY SECURITY FOR DEBT.

(a) Pledge and Hypothecation.

LANGBELL, CLASSIFICATION OF RIGHTS AND WRONGS, 13 HARV. L. R. 539, 540. An obligation is either personal or real, according as the obligor is a person or a thing. . . .

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitudes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage—which was called *pignus* when the thing mortgaged was delivered to the creditor, and

hypotheca when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I. c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

JUST., INST., Lib. IV., c. 6, § 7. Again, the Servian and quasi-Servian actions, the latter of which is also called "hypothecary," are derived wholly from the Praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of a pledge (*pignus*) as security for his rent. The quasi-Servian action is a similar remedy open to any creditor for the purpose of enforcing his pledge or *hypotheca*. So far then as this action is concerned, there is no difference between a pledge and a *hypotheca*; and, indeed, whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called by either name. In other respects, however, there is a distinction between them; for the term, pledge, is properly used only where possession of the property in question is delivered to the creditor, especially if such property be movable; whereas by the term *hypotheca*, strictly speaking, we signify a right arising by mere agreement without delivery of possession.

MOYLE, IMP. JUST. INST., EXCUR. II., p. 6. The latest and most refined form of pledge is *hypotheca*, in which there was no conveyance of either ownership or possession; it was effected by a bare, formless agreement between the debtor and creditor, that certain specific property of the former should be liable in full for his debt to the latter, who should be entitled to sell in default of payment within a prescribed time: "*Contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae; nec ad rem pertinet, quibus fit verbis*" (Dig. 20, I. 4). Such an agreement, in itself, was inoperative to create rights, either real or personal; it was, however, enforced by the praetor, who treated the right of sale as a *ius in re aliena*, of which the creditor could not be deprived by any subsequent act of the debtor, and which he could successfully assert (by remedies of his own introduction) against any other person whatsoever, whether the creditor, his successor, alienee or trustee in bankruptcy. . . .

Hypotheca possessed great advantages over the earlier forms of pledge, of which *fiducia* was quite obsolete in the time of Justinian. The pledgor was never deprived of the use and possession of his property, and yet the creditor was absolutely secured. The class of pledgable objects was largely augmented: Money could now be lent on the security of things not yet in existence, *e. g.*, future crops and expectations ("*et quae nondum sunt, futura tamen sunt, hypothecae dari possunt, ut fructus pendentes, partus ancillar, fetus pecorum.*" Dig. 20, 1.15) or of mere incorporeal rights, real and personal (Dig. 20, 9, I.; *ib.* 11, 2; Dig. 13, 7, 18 pr.). Moreover

it became possible to create a general mortgage, which was done by statute, in favor of many classes of persons: *e. g.*, of a wife or other person who gave a *dos* over the property of her husband, to secure its return, and of pupils over that of their guardians.

GLANVILLE. Lib. X., c. 6 (Beames). A Loan is sometimes made upon the Credit of a putting in Pledge. When a Loan of this description takes place, sometimes moveables, as Chattels, are put in pledge; sometimes immoveables, as Lands and Tenements, and Rents, whether consisting in Money or in other things. When a Compact is made between a Creditor and Debtor, concerning the putting anything in pledge, then, whatever be the mode of pledging, the Debtor upon his receiving the thing lent to him, either immediately delivers possession of the Pledge (*radii seisinam*) to the Creditor, or not. Sometimes also a thing is pledged for a certain period, sometimes indefinitely. Again, sometimes a thing is pledged as a Mortgage (*in mortuo radio*), sometimes not. A pledge is designated by the term Mortgage when the fruits and Rents, which are received in the interval, in no measure tend to reduce the demand for which the pledge has been given. When, therefore, moveables are put in pledge, so that possession be delivered to the Creditor for a certain period, he is bound to keep the pledge safely, and neither to use it, nor in any other manner employ it, so as to render it of less Value. But should it, whilst in Custody and within the Term, suffer deterioration, by the fault of the creditor, a Computation shall be made to the extent of the detriment and deducted from the Debt. But if the thing be of such a description that it necessarily requires some expense and cost, for Example, that it might be fed or repaired, then the stipulation of the parties on that subject shall be abided by. In addition—when a thing is pledged for a definite period, it is either agreed between the Creditor and Debtor, that if, at the time appointed, the Debtor should not redeem his pledge, it should then belong to the Creditor so that he might dispose of it as his own; or no such agreement is entered into between them. In the former case, the Agreement must be adhered to; in the latter, the Term being unexpired without the Debtor's discharging the Debt, the Creditor may complain of him, and the Debtor shall be compelled to appear in Court, and answer by the following Writ.

c. 7. "The King to the Sheriff, Health: Command N. that justly and without delay, he redeem such a thing which he has pledged to R. for a hundred Marks, for a Term which is past, as he says, and of which he complains that he has not redeemed it; and, unless he does so, &c."

c. 8. . . . When a Compact is entered into between a Debtor

and Creditor, concerning the pledging of a particular thing, if the Debtor, after having received the Loan, should not deliver the pledge, it may be asked, what step should the Creditor have recourse to in such a case, especially as the same thing may be pledged to many other Creditors, both previously and subsequently? Upon this subject, it should be remarked, that the King's Court is not in the habit of giving protection to or warranting private Agreements of this description, concerning the giving or accepting things in pledge, or others of this kind, made out of Court, or even in any other Court than that of the King. If, therefore, such Compacts are not observed, the King's Court does not interfere; and hence it is not bound to answer concerning the right of different Creditors, as prior or subsequent, or respecting their privileges.

But, when an immoveable thing is put into pledge, and Seisin of it has been delivered to the Creditor for a definite term, it has either been agreed between the Creditor and Debtor, that the proceeds and rents shall in the mean time reduce the Debt, or that they shall in no measure be so applied. The former Agreement is just and binding; the other, unjust and dishonest, and is that called a Mortgage, but this is not prohibited by the King's Court, although it considers such a pledge as a species of Usury. Hence, if any one die having such a pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the Effects of a Usurer. In other respects, the same Rules should be observed as in pledges of moveables, concerning which we have already spoken. But it must be remarked, that if, after any one has paid his Debt, or has in a proper manner tendered it, the Creditor should maliciously detain the pledge, the Debtor upon complaining to the Court shall have the following Writ:

c. 9. "The King to the Sheriff, Health: Command N. that justly and without delay he render to R. the whole Lands, or such Lands, in such a Vill, which he has pledged to him for a Hundred Marks for a term which is past, as he says, and has received his Money, or which he has redeemed, as he says; and, unless he does so, Summon him by good, etc."

c. 11. If the Creditor lose his Seisin, either by means of the Debtor, or any other person, he cannot recover it through the assistance of the Court; not even by a Recognition of Novel Disseisin. For if he was unjustly and without a judgment disseised of his pledge, by any other person than the Debtor himself, the Debtor may have an Assise of Novel Disseisin. If, however, the Creditor was disseised by the Debtor himself, the Court will not assist him against the Debtor, in recovering his pledge, or in giving a Re-entry, unless through the Debtor himself; for the Cred-

itor should resort to an original Plea of Debt, in order that the Debtor may be compelled to render him satisfaction for his Debt. In such case the debtor shall be summoned by the foregoing Writ of first summons.

CHAPLIN, STORY OF MORTGAGE LAW, 4 HARV. L. R. 6. Using the word *radium*, gage, whether the possession was to be turned over to the pledgee or not, the Norman judges recognized gages or pledges of land, either with or without transfer of possession. If the pledgee took possession, the transaction was a pawn; if not, it was a hypothecation.

It would be the greatest mistake to suppose that feudal seisin was essential to an effectual pledge of land in feudal times. The pledgee might leave the pledgor in possession, and still be secure by recording a written contract of pledge in the King's Court: precisely as, under Justinian, such a contract would have been registered in a public office, or, under the Saxon laws, in a county court or a monastery. This provision for registration was a mere adaptation to English ground of the Roman system.

Even when the pledgee of land, in feudal times, took possession, he did not take a full feudal seisin; he took only a "*quasi*" seisin, a seisin "*de radio*," as it was called—a "pledgee's seisin"—a seisin distinct from a general seisin, not exclusive of that of the pledgor, but consistent with and dependent upon it—a parasitic seisin. The word "seisin," of course, was not exclusively applied to freehold estates in land, but was used of chattels and of chattel estates in land, as leaseholds. And just as a lessee of land had not a seisin of his own, but had his landlord's seisin, so in the case of a pledge, even with the possession, the freehold was deemed to remain in the pledgor, and the pledgee was said to be seised "through" the owner of the fee—to be seised not in his own name, but in the name of another. The heirs of the pledgee who died in possession were spoken of in contradistinction from the "*verus hæres*." The fact that the land so in pledge, and even in the possession of the pledgee, was still viewed as in the seisin of the pledgor, appears from the fact that it was subject to dower, not of the pledgee's, but of the pledgor's widow; and there could be no dower without seisin. If a pledgee in possession were ousted by a stranger, he could not maintain a writ of *novel disseisin* to recover possession; the pledgor had to bring the action, counting on his own seisin. And where one seised as pledgee died in possession, and his heir, being excluded, brought a writ of *mort d'ancestor*, to get possession, he was provided, not with the ordinary writ of *mort d'ancestor*, counting upon seisin generally, but with a special writ, alleging in his ancestor a seisin *de radio*.

The legal remedy for enforcing a simple gage or pledge of land in the time of Glanville, so far from having those harsh features which we are wont to attribute to our early law, followed that just and equitable system of Roman law which was the cradle of our equity. When a debt secured upon land was due, the pledgee had a writ expressly framed for foreclosure,¹ substantially identical with the Massachusetts writ of entry for foreclosure of a mortgage. The process could be enforced by the courts by a seizure of the property pledged, if it remained in the pledgor's possession, or by other dstraint; and there was a conditional judgment, precisely as there is upon the Massachusetts writ of entry for foreclosure, that the debtor should still have a reasonable time to pay before the foreclosure should become absolute.

(b) *Early Statutory Securities.*

2 BLACKSTONE, COM., 160. A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum radium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *De Mercatoribus*, and thence called a Statute Merchant; the other pursuant to the statute 27 Edw. III., c. 9, before the Mayor of the Staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of Parliament in certain trading towns, from whence this security is called a Statute Staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognisance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the Mayor of the Staple at Westminster and the Recorder of London; whereby the benefit of this mercantile transaction is extended to all the King's subjects in general, by virtue of the statute 24 Hen.

¹ Glanv., l. x., c. 7; page 4. *supra*.

VIII., c. 6, amended by 8 Geo. I., c. 25, which directs such recognizances to be enrolled and certified into chancery. But these, by the statute of frauds, 29 Car. II., c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrollment, which is ordered to be marked on the record.

Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *Quia Emptores*, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them; the statute, therefore, of Westm. II. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *De Mercatoribus* (passed in same year) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only half of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple and *elegit*, with the observation of Sir Edward Coke. "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds" (which make them an exception to the general rule), "because, though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors; for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*." This, indeed, only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir, which is probably owing to this: That, being a security and

remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of the profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors, because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

(c) *The Common Law Mortgage.*

LIT. § 332. *Of Estates upon Condition.* Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c.; in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mort gage*, and in Latin *mortuum radium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

§ 333. Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in tayle in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

§ 334. Also, if a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day, &c., as is between them by their deed indented agreed and limited, although the feoffor dieth before the day of payment, &c., yet if the heir of the feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land, and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c., not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c., and the intent was but that the money should be paid at the day assessed, &c., and the feoffee hath no more loss, if it be paid

by the heir, than if it were paid by the father, &c.; therefore, if the heir pay the money, or tender the money at the day limited, &c., and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c., will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

§ 335. And be it remembered that in such case, where such tender of the money is made, &c., and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c., then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him.

§ 337. Also, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is passed. For when the condition is, that if the feoffor pay the money to the feoffee, &c., this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c., and when the feoffor dieth, then the time of the tender is passed. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is aforesaid, for that the time of the tender was not passed by the death of the feoffor. Also, it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c.

§ 338. And note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards.

Co. Lit. 209, *a. b.* This is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a duty before, though the feoffor enter by force of the condition, yet the debt of duty remaineth. As if A. borroweth a hundred pounds of B., and after morgageth land to B. upon condition for payment thereof. If A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding in feoff B. of land upon condition for the

payment of a hundred pounds to B. in nature of a gratuity or gift. In that case if he tender the hundred pounds to him according to the condition, and he refuseth it, B. hath no remedy therefor, and so is our author in this and his other cases of like nature to be understood.

LIT. § 339. Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and, therefore, the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at day appointed, &c.

2 BLACKSTONE, COM. 157. There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

Estates held *in radio*, in *gage*, or pledge, which are of two kinds, *vicum radium*, or living pledge, and *mortuum radium*, dead pledge, or mortgage.

Vicum radium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum radium*, a dead pledge or mortgage (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the

lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money and time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it, therefore, became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter upon the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterward evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate unless

where the security is precarious, or small; or where the mortgagor neglects even the payment of interest; when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II. c. 20, after payment or tender by the mortgagor of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his security. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor: "*Si non sequatur ipsius radii traditio, curia domini regis hujusmodi privatis conventiones tueri non solet*;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land, "*Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*." And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

COOTE ON MORTGAGE. 5, 9. The *mortuum radium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *virum radium*, and such seems to be the opinion generally adopted. But Glanville, as has been observed, gives a different meaning to the origin of the term. He says, "*Mortuum radium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquiescant*;"¹ and applies it to the before mentioned species of usury at common law, viz., a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the mean time; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, and while yet the fetters on alienation were unremoved. We may therefore consider the *virum radium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum radium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained un-

¹ Lib. 10, cap. 6; page 4, *supra*.

diminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum radium*, viz., that the estate was never lost. . . .

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum radium* had by this time totally fallen into disuse, and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment or in a deed of defeazance executed *at the same time* (for the common law does not allow a feoffment to be defeazanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffor re-entered and was in of his old estate, paramount all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post*, or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum radium* and old *mortuum radium*. And in order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring that until breach of condition the mortgagor might hold the estate; and, on the other hand, the mortgagor engaged that, in such event, he would do all lawful acts for further assurance.

Although the common law did not favor conditions, but required strict performance of them, yet it was in certain cases satisfied with the performance of the intent of the condition, though not performed in words; and although a difference was taken between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law and rather considered as belonging to the class of conditions for preserving estates. . . .

Thus mortgages stood at common law, incumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor; and it is difficult to conceive, had the Courts of law been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property.¹

Happily, a jurisdiction was arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor. . . .

Id. 10. It has been already said, that by the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. It has been seen how decidedly opposed to this is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of equity, a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our Courts of equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the common law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he

Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it. Thus, in Beaumont and Fletcher:

Alathe.—Thou hast undone a faithful gentleman,
By taking forfeit of his land.

Alcippe.—I do confess, I will henceforth practise repentance,
I will restore *all mortgages*, forswear abominable usury.
The Night Walker, or Little Thief.—*Conte.*

should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law.

Against the introduction of this novelty, the Judges of common law strenuously opposed themselves; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity. There is no record of the time when this equity was first granted. In the before-mentioned cases of *Wade*¹ and *Goodall*,² which were decided towards the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the 37th year of Elizabeth's reign,³ in which the equity was decreed; and it must soon after this time have been generally in practice, for there is a case decided in the first year of Charles the First,⁴ in which the doctrine seems fully admitted. It was a question as to a mortgage term which had been forfeited by non-payment according to the condition; and the Court held, that although the money was not paid at the day, but afterwards, yet the term ought to be void *in equity*, as well as on a legal payment it would have been void at law. In the intermediate reign of King James the First, the Courts of equity became established in power, and the same period may be reasonably assigned as that in which the doctrine of equity of redemption was fully recognised. . . .

SPENCE, *EQUIT. JURIS.*, 601. The doctrine that a pledge should be forfeited on non-payment at the day, which seems to have prevailed throughout Europe, was considered by the clergy so inequitable, that at the Council of Lateran, A.D. 1178, *temp.* Hen. II., at which bishops from all parts of Christendom attended, it was declared (no doubt with reference to the doctrines which Constantine had promulgated) that where a creditor had been paid his debt and expenses out of the profits, he should restore the pledge to the creditor.⁵

The king's court, as we learn from Glanville, took no cognizance of agreements to pledge, which were not perfected by delivery; these were left to the Court Christian, as cases of *fidei læsio*, of which that

¹ 5 Co. 115.—*Coote*.

² *Ibid.* 96.—*Coote*.

³ *Langford v. Barnard*, Tothill, 134.—*Coote*.

⁴ *Emanuel College v. Evans*, 1 Rep. in Chancery, 10.—*Coote*.

⁵ *Matt. Paris.* 114-5.—*Spence*.

court then had cognizance;¹ the king's court, therefore, took no notice of questions as to the priorities of creditors, by way of mortgage or pledge, where the legal interest did not pass.²

Mortgages of lands appear to have been common in the time of Hen. VI. and Edw. IV. Sometimes they were in the form that the feoffee should take the profits till the mortgagor paid him the debt. Where property was delivered or conveyed as a security, and the debt was duly paid, the Court of Chancery compelled a redelivery or reconveyance of the mortgaged property under its general equitable jurisdiction, and the ancient common law jurisdiction appears to have been superseded. Where the condition in a mortgage deed was not performed so that the property was forfeited, the Courts of Law continued to adhere to the ancient doctrine, and would not allow the smallest liberality in the construction of such conditions. If the default happened from accident, or any other cause that afforded grounds for relief under the general jurisdiction to relieve against penalties and forfeitures, the Court of Chancery interfered: or, if there were any other acknowledged equitable ground, as a collateral agreement that, notwithstanding the forfeiture, the mortgagor should have a right to redeem. But it was a long time before the Court of Chancery could obtain jurisdiction to relieve where the pledge was actually forfeited, and there were no special circumstances.

It is stated by Sir Matthew Hale, that the Parliament in the 14th Rich. II. would not admit of redemption after forfeiture;³ but it appears, on reference to the Parliament Rolls, that the case referred to was a petition addressed to Parliament by a person who alleged, that the mortgage money had been *paid* before the time: all parties were ordered to attend, and on debate it appeared, "as Seignors du Parliament," that the matter was cognizable at law; so the petitioner took nothing by his suit.⁴

The general jurisdiction to relieve against a forfeiture actually incurred appears to have been introduced in this way. Great favour was always shown to sureties, even at law. By Magna Charta, c. 8, the pledge was not to be distrained if the principal debtor were sufficient to pay; but this growing troublesome to the creditor, it fell into use that the pledge should be bound as the principal. However, it seems to have been considered in the Court of Chancery, that

¹ So late as 8 Edw. IV. (Y. B. fo. 4) Bishop Stillington, Chancellor, held that for breach of faith (*pro lacione fidei*) a man was at liberty to sue either in the spiritual court (*Canonica Injuriam*), or else in the Chancery, for the damage occasioned by the breach.—*Spence*.

² Beames [Glanville], p. 257, lib. x. c. 12.—*Spence*.

³ *Roscarrick v. Barton*, 1 Ch. Ca. 219.—*Spence*.

⁴ Rot. Parl. vol. iii. No. 10, p. 258, 9.—*Spence*.

where a person gave a mortgage as *surety* only, if he paid the debt due from the principal debtor with interest even after the day, he did all that he really contracted to do, for it was only on non-payment that he was to be called upon; and out of favour to him the rigid doctrine of the law as to the *time* of payment was relaxed. Thus an advantage was given to the surety that the principal debtor had not, for *he* could only obtain relief on grounds that were applicable to forfeitures generally.

From this time down to the reign of James I., we find the notion of the existence of a general equity in the mortgagor himself to redeem after forfeiture, gradually gaining ground.

At length, in the reign of Charles I. it was established, that in all cases of mortgage, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity, as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day to be named.¹ . . .

The jurisdiction which the Court of Chancery exercises in regard to the equity of redemption of mortgaged premises, so far as regards the co-existent legal rights, is, in some respects, analogous to that which it exercises as regards trust estates, where the mortgage is created by a deed which conveys the legal estate. The Court, to a certain extent, controls the exercise of the legal incidents of the estate or interest which is acquired, making it subservient to the purposes for which it is assumed that it was created, namely, security only; but there is this material difference, that the holder of the legal estate is not, as in the case of a trustee, completely at the command of the court, for the mortgagee does not acquire it in the character of trustee, or for the purposes of the mortgagor or that it may continue to be subservient to the equitable interest. So long, however, as the mortgagee suffers the equitable interest to exist, which, unlike a trustee, he may at his pleasure put an end to by filing a bill for foreclosure, the Court of Chancery moulds and directs the enjoyment and transmission of that equitable interest according to rules and doctrines of its own, though here also taking the common law rules as to property as its guide, just as in the instance of a trust estate, of which we have lately treated. The estate in the hands of the mortgagee and his representatives, is considered, for almost all purposes, as personal estate; the equity of redemption is treated as an *estate in the land*, and as having all the qualities and incidents of real estate; when the mortgage money is paid off the mortgagee becomes in the nature of a trustee for the mortgagor; but the full consideration of these subjects cannot be entered upon at present.

¹ *Emanuel College v. Evans*, 1 Ch. Rep. 11, 1 Cha. I.—*Spence*.

4 KENT, COM., 110. The law of pledges shows an accurate and refined sense of justice; and the wisdom of the provisions by which the interests of the debtor and creditor are equally guarded, is to be traced to the Roman law, and shines with almost equal advantage, and with the most attractive simplicity, in the pages of Glanville.

It forms a striking contrast to the common-law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere right of re-entry, upon performance of the condition, by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default, the condition was forfeited, and the estate became absolute in the mortgagee, without the right or the hope of redemption. So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice, naturally led to exact and scrupulous regulations concerning the time, mode, and manner of performing the condition, and they became all-important to the mortgagor. The tender of the debt was required to be at the time and place prescribed; and if there was no place mentioned in the contract, the mortgagor was bound to seek the mortgagee, and a tender upon the land was not sufficient. If there was no time of payment mentioned, the mortgagor had his whole lifetime to pay, unless he was quickened by a demand; but if he died before the payment, the heir could not tender and save the forfeiture, because the time was passed. If, however, the money was declared to be payable by the mortgagor, or *his heirs*, then the tender might be made by them at any time indefinitely after the mortgagor's death, unless the performance was hastened by request; and if a time for payment was fixed, and the mortgagor died in the mean time, his heir might redeem, though he was not mentioned, for he had an interest in the condition. If the representatives of the mortgagee were mentioned in the feoffment, whether they were heirs, executors, or assignees, the payment could rightfully be made to either of them.¹

Id., 158. In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common

¹ Goodall's case, 5 Co. 95; Co. Litt. 210. This case of Goodall, and Wade's case, 5 Co. 114, are samples of the discussions on what was, in the time of Lord Coke, a very momentous question, whether the absolute forfeiture of the estate had or had not been incurred by reason of non-payment at the day. Such a question, which would now be only material as to the costs, was in one of those cases decided, on error from the K. B., after argument and debate, by all the judges of England.—*Kent*.

law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may well say, that "returning justice lifts aloft her scale." The doctrine, now regarded as a settled principle, was laid down in the reign of Charles I., very cautiously, and with a scrupulousness of opinion. "The Court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought to be void in equity."¹ The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim, that "once a mortgage, always a mortgage." The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass, or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. . . .

The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.² The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are

¹ *Emanuel College v. Evans*, 1 Rep. in Ch. 10. In the case of *Roscarriek v. Burton*, 1 Cases in Ch. 217, Sir Matthew Hale, when chief-justice, showed that he had not risen above the mists and prejudices of his age on this subject, for he complained very severely of the growth of equities of redemption, as having been too much favored, and been carried too far. In 14 Rich. II., the Parliament, he said, would not admit of this equity of redemption. By the growth of equity, the heart of the common law was eaten out. He complained that an equity of redemption was transferable from one to another, though at common law a feoffment or fine would have extinguished it; and he declared he would not favor the equity of redemption beyond existing precedents.—*Kent*.

² 1 Vern. 7, 232, and 2 Vent. 364.—*Kent*.

founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion to be drawn from a view of the English and American authorities.¹

TROWBRIDGE, *READING ON MORTGAGES*, 8 Mass. Rep., 551. Among conditional estates are mortgages of land and tenements. These are sometimes of the freehold and inheritance, and sometimes for a term of years only.

1. Of the freehold and inheritance: Where a feoffment is made upon condition, that if the feoffor pay the feoffee £40 at a certain day, then he shall re-enter, &c. Here the land and all the feoffor's estate in it pass presently to the feoffee by common law; and the feoffor has only the condition left, and no estate in the land that he can assign over (*Co. Lit.* 205 *a*, 210 *a*). So if one here, by deed duly acknowledged and registered, conveys his land to another and his heirs upon the like condition, the land and all the mortgagor's estate in it pass presently to the mortgagee by force of the provincial act of 9 Will. 3, c. 7 (1 P. Will. 74). . . .

It is objected to this doctrine, that Lord Mansfield, in considering what species of property a mortgagee has in the estate mortgaged, lately said (2 Burr. 978, 979), that "a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not

¹*The King v. St. Michaels*, Doug. 630; *The King v. Edington*, 1 East, 288; *Jackson v. Willard*, 4 Johns. 41; *Rungan v. Mercereau*, 11 *ibid.* 534; *Huntington v. Smith*, 4 Conn. 235; *Willington v. Gale*, 7 Mass. 138; *McCall v. Lennon*, 9 Serg. & Rawle, 392; *Ford v. Philpot*, 5 Harr. & Johns. 312; *Wilson v. Troup*, 2 Cowen, 155; *Faton v. Whiting*, 3 Pick. 484; *Blaney v. Bourne*, 2 Greenl. 132. The growth and consolidation of the American doctrine, that until foreclosure the mortgagor remains seized of the freehold, and that the mortgagee has, in effect, but a chattel interest, and that it goes to the executor, as personal assets, and though, technically speaking, the fee descends to the heir, yet he is but a trustee for the personal representatives, and need not be a party to a bill by the executor for a foreclosure, was fully shown and ably illustrated by the Chief Justice of Connecticut, in *Clark v. Beach*, 6 Conn. 142, and by the Chief Justice of Maine, in *Wilkins v. French*, 20 Maine, 111; and by the Chancellor of New Jersey, in *Kinna v. Smith*, 2 Green. 14; and these general principles were not questioned by the courts.—*Kent*.

made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence, nay, it would do it though the debt were forgiven only by parole; for the right to the land would follow, notwithstanding the statute of frauds" (3 Cha. Rep. 3).

Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed nor redeemable, the judge of probate has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever, in fee. . . .

In order the better to settle the authority of these propositions, said to have fallen from Lord Mansfield, it may not be amiss, first to consider the third proposition, viz.: "that the estate in the land is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. It renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord Mansfield did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the close as land, it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple which the mortgagee had in the close by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent,

agreeably to what Lord Keeper Wright said in *Galb. Eq. Ca. 3.* in the case of a mortgage in fee.

The money due on the mortgage could not, by Lord Mansfield, be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money, so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee: That the former was but a chattel and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of Chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together: as though there was no difference between them, which is not reasonable to suppose Lord Mansfield ever did; and, therefore, it must be supposed the reporter did not take down the restrictions, with which his lordship qualified his propositions, and left them to be implied by the reader. . . .

For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not revest the fee in him in law, nor even in equity; because the mortgagee is deemed in such a case by the Court of Chancery a trustee of the mortgagor, &c., until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land (3 Chan. Rep. 3). And surely, forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance. . . .

Upon the whole the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, even after it has become irredeemable, may be distributed by the judge of probate as personal estate," is evident. . . .

Authorities showing the estate, both legal and equitable, to be in the mortgagee: 2 Atk. 352-4; 2 Cha. Ca. 97; 1 Cha. Ca. 285.

¹² If the estate on which a pauper resides is substantially his property, that is sufficient whatever forms of conveyance there may be, and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner." . . . —*Per Lord Mansfield, in The King v. St. Michaels, Doug. 632 (1781).*

(d) *The Equitable Mortgage.*

BURGH v. FRANCIS.

COURT OF CHANCERY, 1673.

(*Rep. temp. Finch*, 28.)

This bill was brought by the executors of the mortgagee against the heir of the mortgagor, to perfect a defective deed of mortgage by feoffment, without livery and seisin, and to be relieved against certain judgments confessed by the defendant Henry Francis, and by Sherrer and his wife, by collusion to defeat the plaintiffs.

The defendants acknowledge by their answers, that they had confessed several judgments all in one term, and most of them at the same time, and to several persons for considerable sums of money, which they set forth, but deny they were since the bill exhibited, tho' they cannot tell when the warrants of attorney were sealed.

This cause being heard by the LORD KEEPER BRIDGMAN, he directed the matter to be examined before a master, and more particularly whether the bill was a new or an amended bill, and when the judgments were obtained, and when the warrants of attorney were dated and sealed, and whether the judgments were confessed after the bill, and after notice of the mortgage; and after the master had made his report, he would give his opinion, &c. the cause was reheard by the LORD SHAFTSBURY, and an accommodation proposed, which took no effect, and being now reheard by the LORD KEEPER FINCH, he decreed that the plaintiffs should be relieved, and that the several judgments ought not to incumber the mortgaged premises, until the mortgage money was all paid.

This decree was not founded on the manner of obtaining these judgments, nor on the special way by which they were endeavored to charge the lands, viz., by pleading that the heir had nothing by descent besides the lands in mortgage, nor upon the priority of the *teste* of the subpoena, which was before the *teste* of the originals upon which the judgments were had, but it was founded on the nature of the case.

For the debt due upon this mortgage did originally charge the land which the debts by bond did not, till they were reduced into judgments; and altho' the mortgage was defective in point of law for want of livery, yet equity, which supplies that defect, did still charge the land, and it ought not to be in the power of the heir

at law to charge it, by acknowledging judgments in prejudice to such equity; the rather, because in this cause it appeared, that the mortgagor had covenanted for him and his heirs, to make any farther assurance; so that when the land descends upon the heir charged with this mortgage, he is in nature of a trustee for the mortgagee till the money is paid, and cannot incumber it; and tho' the creditors had not any notice of this mortgage, yet they shall be bound in this case, because they are not put in a worse condition than they ought to be, viz., to be postponed to the mortgage; and it appeared in proof, that the heir once offered to pay the mortgage money, but upon sight of the defect of the deed he refused, and presently acknowledged all those judgments on bonds, on purpose to load the land with incumbrances, and in effect to pay his father's debts with the money due on the mortgage.

Wherefore the decree was, that the defendant Henry Francis, who was to be heir at law, shall convey to the plaintiffs, or to such whom he shall appoint, a sufficient and perfect estate of inheritance in the premisses, in such manner as the master shall direct, subject to be redeemed upon the payment of the principal and interest due on the former defective deed, and the said lands shall be held as mortgaged, and be quietly enjoyed against the defendants, and all claiming under them since the date of the former mortgage: and that he, to whom the redemption doth belong, may exhibit his bill in convenient time, or in default thereof the plaintiff may exhibit his bill to foreclose.

And a perpetual injunction was awarded to quiet the plaintiff's possession against all the said defendants, and to stay all proceedings at law, but no costs until redemption, or the plaintiff entered to exhibit his bill to foreclose, and then costs to be allowed as in such cases.

SIR SIMEON STEWART'S CASE.

COURT OF CHANCERY.

(2 *Sch. & L.* 7. 381.)

The late Sir Simeon Stewart being embarrassed in his affairs, made a conveyance to the late Lord Delaware, Sir H. Tichborne, and others, in trust, for the payment of his debts. Previous to executing that conveyance, a gentleman of the name of Willis had been prevailed on by Sir Simeon Stewart to lend him a large sum of money; and Sir Simeon wrote him a letter, in which he stated that he would make a mortgage to him on some part of his Hampshire estate; and the question was, whether that was a contract

which bound the trustees, who were trustees for general creditors. The creditors insisted they were purchasers for valuable consideration, without notice of this contract. The fact of notice could not be brought home to the creditors; but it was sufficiently established that the persons who prepared the trust deeds, and were therefore the agents of the creditors and the trustees in that transaction, had full notice: and therefore the only question was, whether this bound the estate in the hands of the trustees, as being an equity affecting Sir Simeon Stewart, prior to his conveyance; for if it bound him, the consequence would be that it bound his trustees, under the circumstances of that deed. The Court did determine that the letter was sufficient to bind him.—*Per Redesdale, L. Ch., in Card v. Jaffray, 2 Sch. & Lef. 374 (1805).*

POMEROY, EQUITY JURISP., § 368. The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels, which presents such a striking and complete contrast with the *legal* method above described. While the legal relations between the two contracting parties are wholly *personal*—things in action—equity views all these relations from a very different standpoint. In some respects and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as *the owner of the land*: an equitable estate has vested in him, commensurate with that provided for by the contract, whether in fee, for life or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase money. The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate—though still wanting the confirmation of the legal title for purposes of security against third persons—he may

convey or encumber it; may devise it by will; on his death, intestate, it descends to his heirs and not to his administrators; in this country his wife is entitled to dower in it; a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it. . . .

Id. § 1235. The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done.¹ . . .

¹ "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged (1 Am. Lead. Cas. in Eq. 510; *Howe's Case*, 1 Paige, 125). The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed: the true meaning of which is that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been (Story, Eq. Jur., secs. 64 and 790; Will. Eq. Jur. 289, 299)."—*Per* Curry, Ch. J., in *Daggett v. Rankin*, 31 Cal. 321 (1866).

BOOK II.
ESSENTIAL ELEMENTS OF MORTGAGE.

CHAPTER I.
CONVEYANCE.

SECTION I.—MORTGAGE, PLEDGE AND LIEN.

RATCLIFF v. DAVIES.

KING'S BENCH, 1610. •

(*Cro. Jac.* 244.)

ACTION of Trover and Conversion of an hatband set with pearls and diamonds: upon not guilty pleaded, a special verdict was found, that the plaintiff was possessed thereof, and pawned it to John Whitlock for £25, but no certain time appointed for the redemption thereof; that Whitlock being sick, his wife in presence, and with his assent, delivered it to the defendant, and afterward he made his said wife his executrix, and died, who proved the will; that the plaintiff tendered to the said executrix the said £25, who refused, and afterward demanded the hatband of the defendant, who refused to deliver it; but converted it to his own use: whereupon, &c. And in this case three points were moved:

First, there being no time appointed for the redemption, whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties, and all the justices resolved, it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. YELVERTON and CROOKER doubted, and held, that it could not; for he at his peril ought to redeem it in his time, as it is upon a mortgage; but

FLEMING and the others against it: for pledging doth not make an absolute property, but it is a delivery only until he pays, &c.; so it is a debt unto the one, and a retainer of the thing unto the other; for which there may be a re-demand at any time upon the payment of the money. For the pledge delivered is but a security for his money lent, so as he who borrows the money is to have again his pledge when he repays it, and his tender gives him interest therein; and there is difference between mortgage of land and pledging of goods; for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods, to detain them for his security (5 *Hen. VII.*, 1; 9 *Ed. IV.*, 25; 36 *Ed. III. Bar.*, 188).

Secondly, it was resolved, that by this delivery of the said goods by the *feme*, with the assent of her *baron*, to the defendant, there passed no interest of them to the defendant, but (as it were) a custody only: and therefore the tender of the redemption ought to be made to the executrix, and not to the defendant.

Thirdly, that when he tendered the money to the executrix, and she refused, it was as good as payment; and the especial property of the goods is revested in the plaintiff: then, when he demanded them of the defendant and he refused to deliver them, but converted them to his own use, a trover and conversion well lies, although he came unto them by a lawful delivery, and not by trover. Wherefore it was adjudged for the plaintiff.

FRANKLIN v. NEATE.

COURT OF EXCHEQUER, 1844.

(13 *M. & W.* 481.)

This was an action of trover for a chronometer: to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the chattel.

At the trial, before *Purke*, B., at the Middlesex sittings in last Trinity Term, it appeared that the chronometer for which the action was brought had been pledged, by a person named Gilbert, to the defendant, a pawnbroker, under a written agreement that it was deposited as a collateral security for the sum of £15, and interest; and that, in case Gilbert should not redeem it before twelve months, the defendant should be authorized to sell it, and repay himself principal and interest. The plaintiff afterward bought the chronometer from Gilbert, whilst it was in the defendant's hands, after the expiration of the year; he then tendered to the defendant the

amount due, and demanded possession of it, and on the defendant's refusing to deliver it, brought the present action. It was contended for the defendant, that no property passed to the plaintiff by the sale; that it was merely an assignment of a right of action, with an equity of redemption; and the learned Judge, being of that opinion, directed the jury to find their verdict in favor of the defendant; giving leave to the plaintiff to move to enter a verdict for him for the sum of £19 10s. *Humfrey* having, in the early part of this term, obtained a rule accordingly,

Petersdorff showed cause (Nov. 14).—The question here is, whether the assignee of the right of a pawnor to redeem an article pledged can maintain an action of trover against the party with whom it is pledged, he having refused to deliver it up. Now, that depends upon the contract made between the parties. The pawnee agrees to deliver the article to the party pledging it, but he does not undertake to deliver it to his assignee. The only right that the pawnor could give to the buyer was a right to claim restitution of the article pledged. The pawnor retained nothing more than a mere right of action. Suppose an injury had happened to the chronometer, could the assignee have sued the defendant? Or suppose the property pawned consisted of twenty different articles, could the pawnor, by selling them separately to twenty different persons, give each of them a right of action against the defendant? It is submitted he clearly could not. In *Story on Bailments*, p. 377, pl. 350, it is said, "Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case the vendee will be substituted for the pledger, and the pledgee will be bound to redeem, and to account to him for the pledge and its proceeds. If he refuses, an action at law will lie for damages, as well as a bill in equity to compel a redemption and account." But it is not there said that an action of *trover* will lie. In *Rich v. Aldred*, 6 Mod. 216, which was an action of detinue for Oliver Cromwell's picture, it was ruled by Lord *Holt*, C. J., at Nisi Prius, that "if A. bail goods to C. and after give his whole right in them to B., B. cannot maintain detinue for them against C., because the *special property* that C. acquires by the bailments is not thereby transferred to B."—He also referred to *Ryall v. Rolle*, 1 Atk. 167; *Kemp v. Westbrook*, 1 Ves. sen. 278; *Reeves v. Capper*, 5 Bing. N. C. 136; 6 Scott, 877; *Legg v. Evans*, 6 M. & W. 36; *Clarke v. Gilbert*, 2 Bing. N. C. 343; 2 Scott, 520, and Com. Dig. tit. "Mortgage," B.

Humfrey (*Crouch* with him) in support of the rule. The pawnor retained a special property in the thing pawned, which he was capable of transferring to the plaintiff. The law as to pawns is derived from the civil law; and in *Story on Bailments*, pl. 307, it

is said, "In the Roman law it should seem that the pledgee has not property in the thing, but he has a mere right of detention or retainer. *Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem*; or, as we should say, the pawnee has a mere lien, and no property." In *Ryall v. Rolle*, BURNET, J., says, "The distinction between mortgages and pawns is laid down in Noy, 137, and in Cro. Jac. 245. There is a difference between mortgaging of lands and pledging of goods; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods, to retain them for his security." The passage cited on the other side from Story on Bailments, pl. 350, that "subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn," is clearly in the plaintiff's favor; for, if the pawnor may sell the property pawned, all the consequences of the sale attach to the purchaser, and he may bring trover for a conversion of the chattel; for, by the sale of a chattel, the interest in it is transferred without delivery. It is a perfect fallacy to say that this was a mere assignment of a chose in action.

Cur. adv. vult.

The judgment of the Court was delivered on the 10th of December by

ROLFE, B. This was an action of trover for a chronometer. It appeared on the trial that the chronometer in question had been pawned by the owner with the defendant, and at the time of the pawn, the owner delivered to the defendant a written paper, authorizing him to sell if the chronometer was not redeemed within a year. The owner afterward sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought this action. On this state of facts, the verdict on the issue on the plea denying the plaintiff's possession, was by the direction of my brother Parke, who tried the cause, taken for the defendant, with liberty, nevertheless, for the plaintiff to move to enter a verdict for him, with £19 10s. damages, in case the Court should be of opinion that he had proved the issue. The learned Judge was inclined to think that this was not the case of a simple pawn, but that the terms on which the chronometer was pledged were such as to give the defendant something more than the right of a pawnee, and operated as a mortgage. If he was a mortgagee, and the absolute property was transferred to him, defensible upon repayment of the money advanced, the assignee of the right of redemption, which only remained in the original owner, could have

maintained no action of trover after tendering the money; but, considering the terms of the instrument which accompanied the deposit, we all agree in thinking, that, though they gave more than the ordinary right of a pawnee, viz., the right to sell, which, being part of the security for the advance, was irrevocable by the pledgor or his assignee, they did not constitute a mortgage or transfer of the entire legal property in the chattel itself. The case, therefore, stands on the same footing, as far as relates to the right of the pawnor, with an ordinary pledge.

A rule *nisi* having been granted, pursuant to the leave reserved, Mr. Petersdorff, for the defendant, showed cause, and contended that the verdict was right, on the ground that a pawnor cannot transfer to another such a right of possession as enables him to bring an action of trover. There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favor of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if what this pawnor transferred, or sought to transfer, was a mere right of action. But this is not so; he transfers the property in the chattel, qualified, indeed, by the right existing in the pawnee, but still a right of property, and the right of action afterwards exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser.

We do not feel at all pressed by the argument *ab inconvenienti*, urged by Mr. Petersdorff. "If several chattels," he asked, "should be pawned for one sum, could separate sales be made of each to different purchasers?" We answer, undoubtedly they may; the pawnee will, of course, not be bound to part with any of the chattels until his whole debt is paid; but, subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made. Again, it is said, suppose the chattel is injured by default of the pawnee, while in his custody, who was to sue the pawnee, the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff, if the action be for a breach of contract express or implied, unless a new one be made with the purchaser; the owner for the time being is the proper plaintiff, if the injury be by the destruction or conversion of the chattel; just as, in the case of a carrier, the

original employer is the person to sue for the loss for negligent carriage, or other breach of contract—the other subsequent purchaser for the conversion after the purchase.

That in ordinary cases of bailment, not by way of pawn, the bailor may sell, is a proposition admitting of no doubt; indeed, it is assumed to be law by Lord Holt, in one of the cases relied on by Mr. Petersdorff (*Rich v. Aldred*, 6 Mod. 216), where he says: "If A. bails goods to C., and after gives his whole right in them to B., B. cannot maintain detinue for them against C. because the special property that C. acquires by the bailment was not thereby transferred to B.;" and there does not seem to be any solid ground of distinction, in this respect, between a bailment by way of pawn and any other bailment.

With so little then of direct authority, we must act on the general principle, that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; that as an incident to such property, he has the right of sale, and that after the sale the purchaser has the same interest in the chattel which the pawnor had. The rule must, therefore, be made absolute.¹

¹ "It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words 'special property,' as alike applicable to the right of personal retention in case of a lien and the actual interest in the goods created by contract of pledge to secure the payment of money. In *Levy v. Evans*, 6 M. & W. 42, the nature of a lien is defined to be a 'personal right which cannot be parted with;' but 'the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation.' Story on Bailments, § 311. In each case *the general property remains in the pawnor*; but the question is as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his treatise on Bailments, § 324, thus describes the right and interest of the pawnee: 'He may by the common law deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee' . . .

"There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Levy v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factor's Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more

BROWN v. BEMENT.

SUPREME COURT OF NEW YORK, 1811.

(8 Johns. 75.)

This was an action of trover, for three horses and a chair. The cause was tried at the Columbia Circuit, in September, 1810, before Mr. Justice Thompson.

The plaintiff proved that he was possessed of the horses and chair, and that, afterward, on the 26th of April, 1810, he tendered the sum of 283 dollars and 5 cents to Bement, one of the defendants, and demanded the horses and chair, who refused to deliver them, and referred the plaintiff to Strong, the other defendant. The plaintiff on the next day, made a tender of the same sum to Strong, and demanded the property, but Strong refused, saying the horses and chair were in possession of Bement. The defendants then produced in evidence an absolute bill of sale of the horses and chair to the defendants, under the hand and seal of the plaintiff, dated 27th October, 1809, for the consideration of 210 dollars

nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, 'appointing him as his servant to keep possession for him.' In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revert the right of possession in the pawnor: but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?"—*Per Mellor, J.*, in *Donald v. Suckling*, 1 Q. B. 585 (1866).

and 35 cents. And the plaintiff gave in evidence a writing bearing the same date, executed by the defendants, by which they stipulated, on the payment of 210 dollars and 35 cents to them, by the plaintiff, in 14 days from the date, to deliver to the plaintiff the horses and the chair; but if the property was lost in the meantime, they were not to be responsible; nor for any expenses attending the property during the time.

It was proved, that before the commencement of the suit, Bement had told the plaintiff he was willing to return the property which remained, but that one of the horses had been sold. The plaintiff answered, that if they could agree as to the price of the horse sold, that would create no difficulty. A verdict was found for the plaintiff, by consent, subject to the opinion of the Court; and it was agreed that if the plaintiff was entitled to recover the whole property, the verdict should be entered for 438 dollars; but if for the one horse only which had been sold, then the verdict was to be for 85 dollars; and if the Court should be of opinion that the plaintiff was not entitled to recover at all, then a judgment of non-suit was to be entered.

Three points were raised for the consideration of the Court:

1. That the writing given by the defendants to the plaintiff made the property a pledge, redeemable at any time.

2. That on tender of the money, the plaintiff's right of action was complete.

3. That the plaintiff was entitled, at least, to recover the value of the horse sold.

Per Curiam. The plaintiff has not shown a right of action. Here was a complete transfer of the title to the goods in question, with a condition of defeasance, on the payment of 210 dollars and 35 cents, in 14 days. This was a mortgage, not a technical pledge; and all that was said in the case of *Cortelyou v. Lansing* (2 Caines's Cases in Error, 200) respecting the nature and redeemableness of pledges, has no application to the case. The distinction between a pledge and a mortgage of goods was recognized by this court in *Barrow v. Parton* (5 Johns. Rep. 258). A mortgage of goods is a pledge and more: for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas the pawnee has but a special property in the goods to detain them for his security (2 Ves. Jun. 378; 1 Powell on Mort. 3). The title of the defendants here became absolute after the 14 days; and though it does not appear whether one of the horses was sold after or before the expiration of the time to redeem, that omission is not material, as no attempt was made, in season, to redeem.

Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

BRACE v. MARLBOROUGH.

COURT OF CHANCERY, 1728.

(2 *Peere Wms.* 491.)

After a decree which referred it to a master to state the several incumbrances and their priority, affecting the estate of Sir William Gostwick, this case arose: A puisne judgment creditor bought in the first mortgage without notice of the second mortgage when he lent his money on the judgment, and the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage? And the Master of the Rolls [*Sir Joseph Jekyll*] on considering the cases and precedents, held,¹

First. That if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*.

Secondly. If a judgment creditor, or creditor by statute or recognizance buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference: for one cannot call a judgment, &c., creditor, a purchaser, nor has such creditor any right to the land; he has neither *jus in re*, nor *ad rem*, and, therefore, tho' he releases all his right to the land he may extend it afterward. All that he has by the judgment is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterward purchased may be extended on the judgment, nor is he deceived or defrauded, tho' the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is

¹ Only so much of the opinion is given as deals with the question under consideration.

defrauded or deceived if the mortgagor before that time mortgage his land to another; and 'tis such a fraud as the Parliament takes notice of and punishes by foreclosing such mortgagor who mortgages his land a second time, without giving notice of the first mortgage, and in that respect this case differs from a puisne mortgagee's buying in the first mortgage.

Fourthly. If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage and statute or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured a farther sum on a security, which, tho' it passed no present interest in the land, yet must be admitted to be a lien thereon.

CONARD v. ATLANTIC INSURANCE CO., 1 Peters, 386 (1828). Action of trespass *de bonis asportatis* brought in the Circuit Court of the United States for the District of Pennsylvania, by the Atlantic Insurance Company to recover against the defendant, John Conard, the Marshal of that district, the value of certain teas shipped on board the ships *Addison* and *Superior*, and brot upon by him, upon an execution in favor of the United States against one Edward Thompson, as the property of the latter. . . . The cargoes had previously been transferred by Thompson to the Insurance Co. by assignment of the bills of lading to secure the payment of a *respondentia* bond. It was held that this constituted a mortgage. The defendant contended that the statutory priority of the United States (Stat. 1792, c. 128, § 65) extended to this case. The Supreme Court overruled the claim in an opinion by Mr. Justice Story, from which the following is taken (410):

"Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself a lien, is yet superior to any lien, and even to an actual mortgage, on the personal property of the debtor."

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelluson v. Smith*, 2 Wheat. 306, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court is that

case is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *feri facias*, the property is divested out of the debtor and cannot be made liable to the United States." The same doctrine may be deduced from the case of the *United States v. Fisher*, 2 Cranch. 358, where the Court declared that "no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes," and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States v. Hooe*, 3 Cranch, 73.

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.

Ex parte FOSTER, 2 Story, 131, 142 (1842). "But it is said that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof, and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. . . .

"It is true, as asserted at the bar, that an attachment upon *mesne* process is constantly spoken of in our Reports as a lien, and doubtless it is so in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance which it bears to liens, generally recognized as such at the common law, or in equity, or in maritime jurisprudence. But, as

has been truly said by Lord Coke, no simile holds in everything. *Nullum simile quatuor pedibus currit*. Lord Tenterden has said that the word lien, in its proper sense, in the law of England, imports that the party is in possession of the thing that he claims to detain, and that where there is no possession, actual or constructive, there can be no lien. And this is generally true, perhaps universally true at the common law, independently of statutory provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow v. Mason*, before the House of Lords (6 East., R. 21, note: *id.* 25), where he says: 'Liens exist at law only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone.' . . .

"In equity, also, liens exist independent of possession, either actual or constructive; as, for example, the lien of a vendor on the land for the unpaid purchase money. But it has been the long established doctrine, in equity, that a lien is not, in strictness, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. It is, therefore, at most, a simple right to possess and retain property until some charge attaching to it is paid or discharged; or a mere right to maintain a suit *in rem* to enforce payment of the charge. Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: 'Liens are not founded on property, but they necessarily suppose the property to be in some other person, and not in him who sets up the right. They are qualified rights.'

"Now, an attachment does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in *custodia legis*, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed and vested. Not in that of equity jurisprudence, for there a lien is not a *jus in re* or a *jus ad rem*. It is but a charge upon the thing, and then only when it has, in like manner, become absolute, fixed and vested." . . .—*Per Story, J.*

CHAPTER I. (*Continued.*)

SECTION II. AFTER-ACQUIRED PROPERTY.

PERKINS, LAWS OF ENGLAND (about 1550). *Grants.* § 65. Now is to shew of things to be granted or charged: And as to that *know*, that it is a common learning in the law, that a man cannot grant or charge that which he hath not: And therefore, if a man grant a rent charge out of the Manour of Dale, and in truth he hath not anything in the Manour of Dale, and after he purchase the Manour of Dale, yet he shall hold it discharged. . . .

§ 86. And, therefore, if the Disseisee of one acre of land grant his right unto a stranger, it is nothing worth; but if he release all his right unto the Disseisor, it is good, if it be by deed. And if he confirm the estate of the Disseisor, the confirmation is good. . . .

§ 90. A Parson of a Church may grant his tythes for yeares, and yet they are not in him at the time. But if Lord and Tenant be, the Lord cannot grant the wardship of the heir of the Tenant, living the Tenant. But if a man grants unto mee all the wooll of his sheep for seven yeares, the grant is good, &c.

 GRANTHAM v. HAWLEY.

COURT OF COMMON PLEAS, 1615.

(*Hobart*, 132.)

Robert Grantham brought an action of debt upon an obligation of £10 against Edward Hawley, the condition whereof was, that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it £20. Now the case upon the pleading and demurrer fell out thus: That one Sutton was seised of the land, and 30 Eliz., in April made a lease of it to Richard Sankee for 21 years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take and carry away to his own

use such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff, and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by *Hutton* for the plaintiff, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not. Also, the lessor never had property in the corn; and, therefore, could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues with the land to the lessor, and it was said to be adjudged. And it was agreed by the Court that if A. seised of land sow it with corn, and then convey it away to B. for life, remainder to C. for life, and then B. die before the corn reapt; now C. shall have it and not the executors of B., though his estate was uncertain. *Nota*, the reason of industry and charge in B. fails, yet judgment in this case was given against the plaintiff, that is, that the property and very right of the corn, when it hapned, was past away, for it was both a covenant and a grant. And, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now, though corn be *fructus industrialis*, so that he that sows it may seem to have a kind of property *ipsa facto* in it divided from the land; and, therefore, the executor shall have it, and not the heirs; yet in this case, all the colour, that the plaintiff hath to it, is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, not certain, yet he had it potentially: for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 H. 6. A parson may grant all the tithewool that he shall have in such a year; yet, perhaps, he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property, for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not *ex vi termini*, gives the trees.

HOLROYD v. MARSHALL.

THE HOUSE OF LORDS, 1861.

(10 *H. L. C.* 191.)

James Taylor carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for 5000*l.* An indenture, dated the 20th September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for 5000*l.*, but could not then pay the purchase money, wherefore it was agreed, &c. that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises') " were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of 5000*l.*, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys, in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of 5000*l.* contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, &c. will at all times, during such continuance as aforesaid, at the request, &c. of the said Holroyds, their executors, &c. do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under the 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and ex-

changed some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the 5000*l.* and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of *scire facias* against Taylor for the sum of 155*l.* 18*s.* 4*d.*, damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for 138*l.* 3*s.* 3*d.*, was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice-Chancellor Stuart, who, on 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the Vice-Chancellor's order was reversed. This present appeal was then brought.

Mr. Malins and *Mr. G. V. Yool* for the appellants.

Mr. Amphlett and *Mr. Hobhouse* for the respondents.

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consid-

eration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a Court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an

immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

Some use was made at the bar and in the Court below of the language attributed to Mr. Baron Parke in the case of *Magg v. Baker*, 3 M. & W. 198. That learned Judge appears to have given not his own opinion, but what he understood would have been the decision of a Court of equity upon the case. He is represented as speaking upon the authority of one of the Judges of the Court of Chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Mr. Baron Parke, speaking of the agreement in the case, says, "It would cover no specific furniture, and would confer no right to

equity." I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in *Mogg v. Baker* related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in *Mogg v. Baker* is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned Judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your Lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

LORD CHELMSFORD. My Lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your Lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this House, but that he was supported in it by my noble and learned friend Lord Wensleydale, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned Lord upon the Woolsack, before whom the last argument took place. His great learning and long experience in Courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which

were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case—see *ante*.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or, in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void (*Robinson v. Macdonnell*, 5 Maule & S. 228). But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree,¹ and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio precedens* in the words of the maxim; and although Chief Justice Tindal, in the case of

¹ *Licet dispositio de interesse futura sit inutilis, tamen fieri potest declaratio precedens quæ sortiatur effectum, interveniente novo actu.*

Lunn v. Thornton, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of *Congreve v. Eretts*, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope v. Hayley*, 5 Ellis & B. 830, 845 (a case much relied upon by the Vice-Chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced

by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in *Mogg v. Baker*, 3 M. & W. 195, 198, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the *corpus* was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or " (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon, in the case of the ship *Warre*, 8 Price, 269, n., in support of it. It must also be observed, that the proposition in *Mogg v. Baker* hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a Court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell resting, as he states, upon

Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bona fide* acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of *Langton v. Horton*, 1 Hare, 549, which was relied upon by the respondents as a conclusive authority in their favor. I need not say that I examine every judgment of that able and careful Judge, Vice-Chancellor Wigram, with the deference due to such a highly respected authority. *Langton v. Horton* was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The Vice-Chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of *fi. fa.*, his Honor, assuming that the equitable title which was good against the assignor would not, under the circumstances of the case, be available against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the Vice-Chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord Cottenham in the case of *Whitworth v. Gaugain*, 1 Phill. 728.

[The noble and learned Lord then discusses the case of *Whitworth v. Gaugain*, and concludes as follows:]

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee

over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord St. Leonards, "any agreement binding property for valuable consideration" will confer a similar right.

It does not appear from this review of the case of *Whitworth v. Gauguin*, that it could have had any influence over the question in *Langton v. Horton*, as to the imperfection of the mortgagee's title, unless something had been done to perfect it. The point does not appear to have been at all noticed by Lord Cottenham, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. *Langton v. Horton* must therefore be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the Vice-Chancellor said, "impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken: and on the arrival of the ship at the port of London, the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. *Langton v. Horton* may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress upon this case, to urge it as an authority that an equitable title would have been defective if certain circumstances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not

take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

LORD WENSLEYDALE. My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole of the case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary; no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mort-

gagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of *Metcalf v. The Archbishop of York*, 1 Mylne & C. 517, 555, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favor of the judgment creditor. If Lord Cottenham really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict. c. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed. . . .

The following order was afterwards entered on the Journals:

"That the decree or decretal order of the Court of Chancery, of the 22d of December, 1860, be reversed; and that the petition for

rehearing, presented by the said respondent, Emil Preller, to the Lord High Chancellor, be dismissed, with costs; and that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this judgment."

MOODY v. WRIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847.

(13 *Metcalf*, 17.)

This was a petition, under St. 1838, c. 163, § 18, for the interposition of the Court, as a court of chancery, in behalf of a creditor of two insolvent partners. The petitioner alleged that Horace Wright and Benjamin B. Hoxse, tanners, and partners in business, applied to the Judge of Probate for the County of Hampshire, in December, 1846, for the benefit of the insolvent laws, and that such proceedings were had, upon their application, that all their estate was assigned to the defendant, as assignee: That the petitioner, in July, 1839, sold and delivered to said Wright & Hoxse, hides, skins and bark, for the sum of \$2374.34, on credit, and took their promissory note therefor, payable in four months, with annual interest, and also took a mortgage of said property, and of other property, which mortgage was duly recorded, and by which they secured to the plaintiff whatever hides, skins, bark or stock, which might afterwards belong to them, wherever situated, and whether manufactured or not, and whether at market or not, or the proceeds of the same, if sold, and also all leather thereafter manufactured from the proceeds of the property then on hand, and in whatever shape it might afterwards exist, or whatever form it might assume, so that the then present and future earnings of the said Wright & Hoxse's tan works, both stock and proceeds, and whether sold or unsold, might stand conveyed, pledged and hypothecated to the petitioner, for the payment of said purchase money and note: That said note and mortgage had never been satisfied, discharged or cancelled, and that their validity had been repeatedly recognized and confirmed by said Wright & Hoxse, by the payment, and indorsement on the note, of the annual interest thereby secured: That the petitioner, at the first meeting of the creditors of said Wright & Hoxse, presented a petition to said judge of probate, setting forth the facts above mentioned, and also stating that the property intended to be secured by the mortgage aforesaid had been taken by the messenger, under the warrant issued according to the provisions of the insolvent laws, and praying that said

property might be sold, and the proceeds thereof applied to the payment of said note, and that he might be admitted as a creditor for the residue, if any; referring to the schedules and return of the messenger for a description of the property to be sold; but that said judge of probate "did order and decree that the prayer of said petition should not be granted:" That a large amount of the property intended to be conveyed and hypothecated, as aforesaid, was taken by said messenger, and afterwards by the defendant, as assignee, in behalf of the general creditors of said Wright & Hoxse: That although, in the course of the business of said Wright & Hoxse, the identical property which was sold and delivered to them, as aforesaid, by the petitioner, was changed into other forms, yet the proceeds thereof were so used and invested as to assume the form of and become the property thus taken by said messenger and the defendant; that said property, thus taken and held by force of said mortgage, was a portion of the property and earnings of Wright & Hoxse's tan works, and was described in said mortgage, and therein pledged and hypothecated to the petitioner; and that said Wright and Hoxse continued their business as tanners until said warrant issued.

The petitioner's *prayer* was, that the property aforesaid, taken by the defendant, as assignee, or the proceeds thereof, might be applied towards the payment of said note, and that he might be admitted as a creditor, for the residue thereof, if any, according to the provisions of St. 1838, c. 163, § 3; and that such other order or decree might be made in the premises, as law and justice might require.

The *answer* of the respondent averred, that all the property belonging to the said Wright & Hoxse, at the date of said note and mortgage, was afterwards, from time to time, disposed of by them, at their pleasure, and that at no time between the date of said mortgage and the taking of their property by the defendant, as assignee, did they ever set apart to the petitioner any specific portion of their property, which might have been purchased, if any was so purchased, with the proceeds of the property included in said mortgage; nor did they ever account to the petitioner, specifically, for the proceeds of the same, or any part thereof; nor did they, in the purchase and acquisition of stock, or other property which might have belonged or come to them, after the date of said mortgage, make any distinction between such, if any, as was purchased or acquired with the specific proceeds of the property belonging to them when said mortgage was executed, and that which was the proper fruit of their own personal labor, money and income, or which accrued to them from any other source than the sale of said hypothecated property. Wherefore the respondent prayed that the decree of the Judge of Probate might be affirmed.

The arguments in this case were submitted in writing.

Huntington for the petitioner.

Delano for the respondent.

DEWEY, J. The positions taken by the opposing counsel have been fully and ably presented, in their respective arguments, but, in the view we have taken of the case, it has become unnecessary to express any opinion upon several of the points raised. We have directed our attention more particularly to one, which is a leading and material one, and decisive of the case.

The instrument offered in evidence by the petitioner, as the foundation of his claim, purports to convey to him certain articles of personal property, consisting of hides, skins and bark, all then in existence, and in possession of the grantors, and also whatever hides, skins, bark or stock, of whatever description, that may hereafter belong to the grantors, wherever situated, and whether manufactured or not, and at market or not, or the proceeds if sold; also, all leather thereafter manufactured from the proceeds of property then on hand, and in whatever shape the property might thereafter exist, or whatever form it might assume; so that the then present and future property and earnings of the tan works might stand conveyed, pledged and hypothecated to the petitioner.

This instrument, so far as it purports to mortgage the property of the mortgagors then in existence, and held by them, was in all respects a valid instrument; and if any such property now remains for it to operate upon, it will be effectual to pass the same to the petitioner. We understand, however, that the case shows no such property in the hands of the assignee, and that the specific property conveyed by the petitioner to Wright & Hoxse, and by them reconveyed in mortgage to him, has no longer any existence, and that the only ground of sustaining this petition is that of a lien upon subsequently acquired property, which had no existence at the time of the execution of the mortgage, and which has no other connection with it, than that, to some extent, it may have been purchased with funds which were the proceeds of various sales from the tannery; first, of the articles purchased, and their proceeds applied to the purchase of new stock, which, when manufactured, was again sold, and its proceeds invested; and so from time to time. This instrument is clearly, therefore, an attempt to mortgage or hypothecate after acquired property. Can such security be made effectual by the making and recording of such instrument, without any further act of the parties, with no delivery by the mortgagor, and no act on the part of the mortgagee, taking possession or exercising any rights of property in the newly acquired articles, by virtue of the provisions in the mortgage as to property?

This subject has been recently before us, in the case of *Jones v. Richardson*, 10 Met. 481, involving the question as to the validity of such a mortgage in a court of law. The subject was very maturely considered, and the Court were all clearly of opinion that such mortgage did not pass after acquired property. It was stated, in that case, as an elementary principle, that "a person cannot grant or mortgage property of which he is not possessed, and to which he has no title." All the qualification introduced was, that one may grant personal property of which he is potentially, though not actually, possessed, as in the case of the grant of all the wool that shall grow on the sheep he owns at the time of the grant, but not wool which shall grow on sheep which are not his, but which he may afterwards buy.

In our opinion these principles as to conveyance of property are equally sound and equally to be enforced, whether the question as to the right of property is raised in a court of law or of equity. The parties appear before us, each claiming the property by conveyance; the petitioner by the instrument already recited, and the defendant as assignee, holding by virtue of a deed from a master in chancery, for the benefit of all the creditors of Wright & Hoxse. Whether it would really be more equitable, in a case like the present, that the after acquired property should be holden by the one party or the other; whether the claims of the individual creditor would, in an equitable view, be more meritorious than those of the entire body of creditors, seeking a distribution *pro rata*, would depend, not so much on anything disclosed on the face of the mortgage, as upon a full knowledge of the entire course of business of the mortgagor, and the circumstances appertaining to the property which is now the subject of controversy, the mode of its acquisition, &c.

Supposing ourselves clothed with full equity powers, and treating this case as before us unembarrassed by any question as to our limited jurisdiction in chancery, we are not satisfied that the petitioner has shown any such title to this property as would authorize us to hold it to be subject to a lien for the note of Wright & Hoxse to the petitioner, as against creditors who have acquired a right to it before any act of the petitioner had taken place, reducing the property to his possession, or by asserting effectually any right under the prospective hypothecation, as by making a claim and taking possession under it, while in the possession of Wright & Hoxse. There are doubtless equitable liens which may be enforced in courts of equity, though not available in a court of law. Many such might be enumerated. That which nearest approaches the present case is that of an agreement to convey property, or do some act, the performance of which has been casually postponed.

and in dealing with the rights of the parties in such case, a court of equity will consider a thing done which was agreed to be done. That class of cases does not present, however, the difficulties that arise in the present case. The property which is the subject of the agreement, in the case supposed, was in existence, and the power to convey the same, or stipulate for a conveyance, existed. Nor do the cases of *Davis v. Newton*, 6 Met. 537, and *Eastman v. Foster*, 8 Met. 19, at all conflict with the view we have taken of the present case. The property, in reference to which those cases presented questions, was in existence, was susceptible of being conveyed and was the subject of bargain and sale. In the case *Eastman v. Foster*, more particularly relied upon, the mortgage was a good and valid mortgage in law, and of property then in existence, and the party only went into equity to enforce a claim arising under such valid mortgage. The case was one of implied trust, of which this Court has jurisdiction, and which it may well enforce.

The difficulty that presses in the present case is the want of any binding original contract, which *per se* could have force and effect to change the after acquired property, without some further act by the parties, after the property should have come into existence. Such act we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story in the case of *Mitchell v. Winslow*, 2 Story, R. 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity.¹ In relation to that case, it is supposed by the counsel for the petitioner, that it had, to some extent, the sanction of this Court, in the remarks of the judge who delivered the opinion in the case of *Jones v. Richardson*. But we apprehend that no such view was intended to be suggested. The case then before the Court was an action at law; and the obvious and quite sufficient answer to the case of *Mitchell v. Winslow* which was relied upon by the then plaintiffs, was "that was a case in equity," without entering upon the further inquiry whether we should, as a court of equity, in a

¹ "It seems to me a clear result of all the authorities that wherever the parties by their contract intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy."—*Per* Story, J., in *Mitchell v. Winslow*, 2 Story, 630, 644 (1843).

case before us, come to the same result. The case of *Langton v. Horton*, 1 Hare, 549, much relied upon as sanctioning the doctrine that such conveyance might be supported in a court of equity, seems to us to go no further than this, viz., that there having been such a contract between the parties as would in equity have given the plaintiff a title to the cargo when it arrived, and that contract having been perfected by possession lawfully taken, it being a case of property mortgaged while at sea, and it being sufficient to take possession forthwith on its arrival, the plaintiffs were entitled to hold under this contract as against a judgment creditor. On the other hand, another adjudication may be referred to as strongly sustaining the view we take of the invalidity of this mortgage in equity. I allude to the case of *Mogg v. Baker*, 3 M. & W. 195, in the Court of Exchequer. As I understand that case, the doctrine that a lien may be enforced in equity, in a case like the present, is wholly repudiated. The Court held that an agreement to mortgage certain specific furniture then in existence would constitute an equitable title in the party holding such agreement, and prevent its passing to the assignees of the insolvent; but if it was only an agreement to mortgage the furniture to be subsequently acquired, then it would confer no right in equity. It is true, as was remarked by the counsel for the petitioner, that the Court were dealing there with the equity principle of construing that to have been done which was agreed to be done; but no question arose as to the correctness of that principle of equity, and the only point of controversy was, whether, taking that to have been done which was agreed to be done, it would constitute a valid, equitable lien. And whether it would do so or not, was made to depend upon the fact whether the property was subsequently acquired; and, if so, it was held that the agreement would confer no right in equity. The doctrine of that case, which seems fully to sanction the principle we have adopted in the present case, was affirmed by the Court of Queen's Bench, in *Gale v. Burnell*, 7 A. & E., N. R. 850.

The result to which we have come, upon the present petition, may be stated in the following propositions: The petitioner cannot hold the property in controversy, as mortgaged property, because it was not in existence, and, therefore, not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge, because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement without being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of

such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such a case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

As to the point suggested, that this agreement between these parties might be treated as a conditional sale by the petitioner, the change of property to take effect only on payment of the note, it was competent for the petitioner to have made such a conditional sale, and the effect of such sale would have been, that he would not have been divested of the property in the articles thus conditionally sold. But no such principle can avail the petitioner here, as no articles remain in existence that were his property and possessed by him at the time of the sale. The petitioner seeks not to reclaim such articles, but those subsequently acquired by his debtors. Nor is there any ground for the suggestion that this may be treated as the constitution of an agency on the part of Wright & Hoxse, and that, as such agents, all their acquisitions would enure to the petitioner as the principal until the note of Wright & Hoxse was fully paid.

In no way, that we perceive, can we give effect to this contract,

so as to give the petitioner the lien upon the after acquired property, that he seeks to establish.

Petition dismissed with costs.³

SMITHURST v. EDMUNDS.

COURT OF CHANCERY OF NEW JERSEY, 1862.

(14 N. J. Eq. 408.)

This was a motion to dissolve an injunction, under circumstances which are fully stated in the opinion of the Chancellor.

THE CHANCELLOR. The complainant, being the owner of the Columbia House hotel, at Cape Island, with its appurtenances, and of the furniture therein, and being in possession of the premises, by an indenture bearing date on the seventh of June, 1860, leased the real estate to James H. Laird, for the term of three years from the first of May, 1860, at the yearly rental of \$5000, payable in equal installments, on the fifteenth day of July and thirty-first day of August in each year, and sold and transferred to the lessee, the furniture and other household articles for the sum of \$5563 12. Laird, as the lessee, as a collateral security for the punctual payment of the rent, resold and retransferred to the lessor all of said furniture and other household articles, and also sold, assigned and transferred and covenanted and agreed to sell, assign and transfer all other articles of furniture which the lessee should purchase and place, or cause to be purchased and placed upon said demised premises during the said term, it being then known to and contemplated by said parties that it would be necessary for the lessee to purchase and place a large amount of furniture on said premises, in addition to that which was then there, and it being the agreement and intention of said parties that when and so often as any additional furniture should be purchased and placed on the premises by the lessee, it should be deemed and considered as belonging to the complainant as collateral security for the payment of said rent. And the lessee, among other things, covenanted and agreed with the lessor that the said furniture and other household articles, as well as that which then was on said premises as that which should thereafter be placed thereon by the lessee, should not be sold or otherwise disposed of, or removed from said premises during

³ Followed, *Low v. Pew*, 108 Mass. 347 (1871); *Channuth v. Tenney*, 10 Wis. 397 (1860). But see *Chase v. Denny*, 130 Mass. 566 (1881).

the term, but should remain thereon, as the property of the complainant, as collateral security for the payment of said rent.

The bill charges that, in pursuance of the lease, the lessee entered upon the possession and enjoyment of the premises, and that large arrears of rent are due to the complainant; that after the execution of the lease, the lessee, as had been contemplated, purchased and placed on the demised premises a large amount of furniture, of the value of about \$5000, in addition to that purchased of the complainant, which still remains thereon. The complainant insists that, by virtue of his contract with the lessee, all the said furniture belongs to him as collateral security for the payment of rent, and that it cannot lawfully be sold or removed from the said premises by the said lessee, or by virtue of any process or proceedings against him.

The bill further charges, that sundry judgments at law have been recovered against the lessee, and that, by virtue of executions issued thereon, the sheriff of the County of Cape May has levied upon the said furniture on the demised premises, and advertised the same for sale. The bill prays that an injunction may be issued to restrain the sheriff from selling the said furniture, or any part thereof, and from removing the same from the demised premises. An injunction issued pursuant to the prayer of the bill. The defendant now moves to dissolve the injunction for want of equity in the bill.

The question at issue turns upon the validity and effect of the contract between the complainant and Laird relative to the furniture and other household articles specified in the agreement. As to so much of the furniture as was sold by the complainant to Laird, and which was upon the premises at the date of the lease, the validity of the contract is not called in question. But in regard to that part of the furniture which was not at the time owned by the lessee, but which it was then contemplated should thereafter be purchased and placed upon the premises, it is insisted that the contract is invalid and inoperative (2 Story's Eq. Jur., § 875; 1 Eden on Inj., Waterman, 15 p. note). . . .

To authorize the interference of the Court, the complainant must show by his bill the existence of a right, legal or equitable, and the danger of the deprivation of that right. No fraud is imputed to the parties in the making of the agreement. It must be assumed that the contract was made in good faith and for the purpose of securing a *bona fide* debt thereafter to grow due.

The objection is, that a valid sale or transfer cannot be made of chattels which at the time of the contract are not owned by the vendor, and have no actual or potential existence. It is clear that, if valid at all, the contract must be valid as a chattel mortgage.

It is not a pledge. These chattels were not delivered, and they were not capable of delivery at the time of the contract. They had no existence. At the common law, there cannot be a technical pledge of property not then in existence or to be acquired by the pledgor *in futuro* (Story on Bailments, §§ 286, 294).

It is equally clear that the contract cannot operate as a legal sale or mortgage of the chattels. To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold (*Grantham v. Hawley*, Hobart's R. 132; Co. Lit. 265, a, note 1; *Robinson v. Macdonnell*, 5 Maule & S. 228; 2 Kent's Com. 468; 1 Parsons on Cont. 437; Story on Sales, §§ 185, 186).

It is not necessary that the vendor should have the actual property, or that the chattels should have an actual existence. It is enough that he have it potentially. The distinction was taken in the early case of *Grantham v. Hawley*, already referred to. The lessor in that case covenanted that the lessee of a term might take the corn that should be growing at the end of the term. It was held that the words were good to transfer the property as soon as it was extant, the lessor of the land having the crops not actually, but potentially. So it was said, a parson may grant all the tithes of wool that he may have in a certain year. But a man cannot grant all the wool that shall grow upon his sheep that he shall hereafter buy, for there he hath it neither actually nor potentially. The distinction will be found recognized in most of the leading cases, and fully stated by the elementary writers already cited.

In this case the lessee had neither actual nor potential property in the chattels mortgaged. They were articles which it was contemplated should be thereafter purchased by the lessee, and the agreement is, that when and so often as any additional furniture shall be purchased and placed on the premises by the lessee, it shall belong to the lessor as collateral security for the payment of rent, and shall not be sold or otherwise disposed of or removed from the premises during the term. It will be assumed, as the authorities clearly establish, that the agreement does not constitute a valid transfer or mortgage at law of the after acquired chattels. The real question is, whether the contract creates an equitable mortgage of the chattels which a court of equity will enforce and protect as against a subsequent execution creditor.

In the case of *Langton v. Horton*, 1 Hare, 519, this question was carefully examined and decided by Vice-Chancellor Wigram. The owner of a whaling ship, then on her voyage to the South Seas, in order to secure to the assignees certain indebtedness for advances, assigned the ship, with her appurtenances, and also all oil and head matter and other cargo which might be caught and

brought home in the said ship on and from her then present voyage. It was held that the assignment was, as against the assignor, a valid assignment in equity, as well of the future cargo to be taken during the particular voyage as of the cargo, if any, which existed at the time of the assignment; and the master, having delivered up possession of the ship and cargo to the mortgagees immediately upon his return from the voyage, it was further held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterward sued out a writ of *fiery facias*, and proceeded to take the ship and cargo in execution. It may be suggested that the owner of the ship might be deemed to have a potential ownership in the whales to be thereafter caught during that particular voyage, and that upon this ground the assignment might be held valid at law. It was held otherwise, and a similar assignment was declared to be invalid at law by Lord Ellenborough, in *Robinson v. Macdonnell*, 5 Maule & Sel. 228. But if by any latitude of interpretation that view might be taken, it manifestly did not influence the result of the cause.

In the course of his opinion, the Vice-Chancellor says: "I lay out of the view all questions as to the operation of the instrument at law, and look at the case only as a question in equity." And again he says: "I rely in this case on the general principle, that there having been such a contract as would in equity entitle the plaintiffs, as against the owner, to the cargo when it arrived, and the title under that contract having been perfected by a possession lawfully taken under the deed, which there is no attempt on the part of the owner to impeach, the subsequent judgment creditor cannot take that property from the plaintiffs." It may be again suggested that there is this further dissimilarity between the cases. In the reported case, the ship and cargo, on her return from the voyage, was delivered to the mortgagees, and thus the equitable title of the mortgagees was perfected; whereas in the present case the chattels were not delivered to the mortgagee, but remained in the possession of the mortgagor. It is true the chattels were not in the actual possession of the lessor, but they were delivered to the lessee upon the demised premises, where, in accordance with the contemplation of the parties and the terms of the agreement, they were to be used by the tenant, and from which they were not to be removed during the continuance of the term. This in no wise affected the validity of the contract, but was a delivery according to the terms and spirit of the contract, which perfected the equitable title of the mortgagee. In this regard there is no real dissimilarity between the cases.

In the more recent case of *Mitchell v. Winslow*, 2 Story's R.

630, this question underwent a more elaborate examination, by Mr. Justice Story, in the Circuit Court of the United States. The Court held that to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But the courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only. . . .

In the course of a very elaborate opinion, after quoting at some length from the opinion of the Vice-Chancellor in *Langton v. Horton*, Judge Story said: "Now it seems to me that this reasoning is exceedingly cogent and striking, and it stands upon grounds entirely satisfactory and conclusive upon the whole subject." And as the result of his investigation, he adds: "It seems to me the clear result of all the authorities, that wherever the parties by the contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy." These cases, I think, in principle clearly control the present case, and I am quite satisfied to rest my conclusion upon their authority. It would be difficult, indeed, upon a question of equity, to cite higher authority, upon either side of the Atlantic, than the eminent judges whose opinions have been referred to.

A further question occurs, viz., whether, admitting the equitable mortgage to be valid against the mortgagor, and all persons claiming under him with notice, it will be enforced against a subsequent judgment creditor of the mortgagor. It was so held by Vice-Chancellor Wigram in the case of *Langton v. Horton*, already cited. The subject afterwards underwent a more elaborate examination by the same learned judge, in the case of *Whitworth v. Gaugain* 3 Hare, 416, where the grounds of his conclusion are clearly and convincingly stated. . . .

The motion to dissolve the injunction is denied with costs.

LOOKER v. PECKWELL.

SUPREME COURT OF NEW JERSEY, 1876.

(38 *N. J. Law*, 253.)

In replevin. On error to the Essex Circuit.

The opinion of the Court was delivered by

VAN SYCKEL, J. This cause was tried in the Essex County Circuit Court, by consent of parties, before the Court without a jury, upon admitted facts. A brief statement will present the point in issue. One John M. Mackenzie, to secure his debt to the plaintiff, executed to him a mortgage upon the fixtures, stock and materials, &c., of his bakery in Newark, described therein as follows: "All the bake-house fixtures and utensils now being in and about my bakery, No. 413 Broad street; also, all flour, &c., and all other stock manufactured, and unmanufactured, and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same or any part thereof, together with," &c.

The mortgage was duly registered, as required by law. After the delivery of the mortgage, Mackenzie, in order to replenish his stock, purchased twenty barrels of flour, which were delivered to him on the sidewalk in front of his bakery, where they were seized by the defendant as sheriff, by virtue of an execution in his hands, upon a judgment in favor of Totten against said Mackenzie, for goods sold to him after the making and registering of the mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties. The question submitted on the case is, whether the twenty barrels of flour were subject to the lien of the mortgage?

Perkins, tit. Grants, § 65, says: "It is a common learning in the law, that a man cannot grant or charge that which he hath not." A grant will operate only upon goods which the grantor has actually or potentially at the time of the grant.

Chief Justice Tindall fully recognized this rule in *Lunn v. Thornton*, 1 Com. Bench, 379, which has since been received as authority both in England and this country, as applicable to sales as well as to mortgages.

The suggestion of Chief Justice Tindall, that the grant might be so framed as to give the grantee a right between themselves to seize after-acquired goods of the grantor, was acted upon in *Congreve v. Eretts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & B. 830,

and in other cases cited below, but the doctrine held in the principal case has not been shaken; on the contrary, it is in a mass of cases declared to be settled, if not elementary law (*Gale v. Burnell*, 7 Q. B. 850; *Chidell v. Galsworthy*, 6 C. B. [N. S.] 471; *Jones v. Richardson*, 10 Mete. 481; *Barnard v. Eaton*, 2 Cush. 294; *Rice v. Stone*, 1 Allen, 566; *Low v. Pew*, 108 Mass. 347; *Van Hoozer v. Cory*, 34 Barb. 9; and many other cases cited in Benjamin on Sales, § 79, note k).

That this is the rule at law, is regarded by Chancellor Green in *Smithurst v. Edmunds*, 1 McCarter, 408, as beyond controversy. He says that to constitute a valid legal sale, the vendor must have a present property, either actual or potential, in the thing sold.

The judgment of the Court below in favor of the defendant was right, and should be affirmed.

BRETT v. CARTER.

DISTRICT COURT OF THE UNITED STATES, 1875.

(2 *Lowell*, 458.)

Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day he gave back a mortgage to secure the payment of the purchase money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded farther security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants asked leave to amend, and allege the first mortgage to

be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

LOWELL, J. The Court of Appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law (*Griswold v. Sheldon*, 4 Comstock, 581). This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York, Ohio and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa. In several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on *Voluntary and Fraudulent Conveyances*, p. 126, and by the cases he cites, and by the learned editors, both English and American, of *Smith's Leading Cases, notes to Twyne's Case*, Vol. I., p. 1, &c. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, first, such as are expressly made so by statute: as, for instance, when a bankrupt retains the order and disposition of goods, as apparent owner, with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court, *Sawyer v. Turpin*, 91 U. S. (1 Otto) 114, 121; or, second, Where the act is necessarily a fraud on creditors, as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole

of it to one antecedent creditor. These, to be sure, are examples, but very few others could be adduced, and I understand the true law both here and in England to have been, until lately, that a conveyance for valuable present consideration is never a fraud in law on the face of the deed, and, if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor.

It is very strange that after our Legislatures have met the difficulty in *Twyne's Case*, by requiring registration, which gives not only constructive, but in most cases actual notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud.

It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose, for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant. I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*, 20 Iowa, 399, and of Judge Campbell in *Gay v. Bidwell*, 7 Mich. 519, in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is that this brings us to an ultimate fact of observation and experience, and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given. Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain installments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage, but I am asked to find fraud in law when I know, and it is admitted, there was none.

in fact. Besides cases already cited, see *Briggs v. Parkman*, 2 Met. 258; *Jones v. Huggeford*, 3 *id.* 515; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Mitchell v. Winslow*, 2 Story, 630; *Abbott v. Goodwin*, 20 Maine, 408.

The second point in this case is no less interesting than the first. By the mortgage, the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, as cases presently to be cited will show, that after acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens* after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old. It may be cause of regret that the law should be different in the courts of common law and equity, but this is of no importance in bankruptcy, because it has been the law for a great while that an assignee in bankruptcy takes only the beneficial interest of the bankrupt; and the courts of law have admitted equitable defences, such as equitable liens, &c., to be set up in such cases, years before they had power by statute or usage to admit equitable pleas in ordinary controversies; and it was every day's practice to find these courts passing upon equitable titles in behalf of a defendant, which they professed to know nothing about, and certainly could not deal with, if relied on by a plaintiff. Such was and is the law, and a very just law, as far as it goes.

But granting the rule in equity to be that after-acquired chattels may be mortgaged, the point that has given me most difficulty is whether such is the law of Massachusetts. I suppose that the Federal courts, in all matters of title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the State in which they sit. Or, in other words, I understand that the thirty-fourth section of the judiciary act, making the laws of the State the rule in actions at common law, is declaratory only, and that on both sides of this Court I am bound to follow the law of Massachusetts in the local questions, and the general law in general questions.

Now, the only decision I can find in equity in this State upon this subject certainly decides very distinctly that even in equity a mortgage of after-acquired chattels is invalid (*Moody v. Wright*, 13 Met. 17). In that case the Court refused to follow the then re-

cent decision of Story, J., in *Mitchell v. Winslow*, 2 Story, 630, and relied largely on the dictum of a very distinguished judge, Baron Parke, who said, in *Mogg v. Baker*, 3 M. & W. 195, that there was no such lien in equity. Some years after these decisions were rendered the House of Lords unanimously followed the doctrine of Judge Story, and reversed a decision of Lord Campbell, which had been founded on the dictum already referred to, and Baron Parke concurred in the reversal (*Holroyd v. Marshall*, 10 H. of L. 191). This was not a new doctrine in courts of equity. (See *Curtis v. Auber*, 1 Jac. & W. 532; *Re Ship Warre*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 428; *Re Howe*, 1 Paige, 129.)

These cases have been repeatedly followed in England, and even more often in this country, and, so far as I am aware, with not a single decision the other way of late years. It is true that a great many of the cases arose upon mortgages given by railroad companies, and some few judges have founded a distinction upon that circumstance. But there is no difference in principle between the mortgage by such a corporation of its rolling stock not yet *in esse* and that by a trader of his future stock in trade in a particular shop. The truth merely is, that from the nature of the former, the large sums which they deal with, and the time at which they must be negotiated, which is before the road is finished, attention was called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors or even of subsequent mortgagees; but similar injustice will be done in all such cases to the extent of the value involved. The following are some of these decisions: *Holroyd v. Marshall*, 10 H. of L. 191; *Pennock v. Coe*, 23 How. 117; *Morrill v. Noyes*, 56 Maine, 458; *Pierce v. Emery*, 32 N. H. 484; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phila. &c. Co. v. Woolpper*, 64 Penn. St. (14 Smith) 366; *Phillips v. Winslow*, 18 B. Mon. 431; *Sillers v. Lester*, 48 Miss. 513; *Pierce v. Mil. R. R. Co.*, 24 Wis. 551.

Considering the decision of Judge Story in this circuit, and the reasons given by the Court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's dictum, I am not prepared to say, that if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it, and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid.

I am of the opinion that the mortgage of 1874 created a valid

lien in behalf of the defendant upon the stock of goods in the shop at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate this lien. The fixtures, however, which were not mentioned in the first mortgage, cannot be held by the second, because that was given after the bankrupt had become insolvent, to the knowledge of the defendant.¹

Decree accordingly.

KRIBBS v. ALFORD.

COURT OF APPEALS OF NEW YORK, 1890.

(120 N. Y. 519.)

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee. The nature of the action and the facts are sufficiently stated in the opinion.

PARKER, J. On the 15th day of May, 1880, one Johnson, then being the owner in fee of certain lands, executed and delivered to Thomas Argue an instrument in writing (which for convenience will hereafter be termed a lease), which conferred upon the latter the exclusive right to produce oil and gas from said land for a period of twelve years. For that purpose it permitted him to go upon the land and make necessary erections; but as to any other use Johnson reserved the possession and right of enjoyment. It gave to Argue the right to remove any and all tools, boilers, engines and machinery; also the casing to the wells and drive-pipe, if Johnson should refuse to pay a fair price therefor.

Pursuant to the terms of the lease Argue and his assignees placed upon the property engines, boilers and other machinery necessary to carry on the operations for which the lease provided, and in view of the intent of the parties as manifested by the terms of the lease and otherwise, these articles retained their character of personalty after annexation (*Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 *id.* 28; *Hoyle v. P. & M. R. R. Co.*, 54 *id.* 311, 324; *McRea v. C. N. Bank*, 66 *id.* 489-495).

In October, 1880, Argue assigned his interest in the lease to Albert Garrett and Adam Prentice. Thereafter Adam Prentice, to

¹ *Scharfenburg v. Bishop*, 35 Ia. 60 (1872), *accord.* This is the prevailing view. The contrary opinion, which formerly prevailed in Illinois (*Hunt v. Bullock*, 23 Ill. 320 [1860]; *Palmer v. Forbes*, *id.* 301) seems to have been dissipated. *Borden v. Croak*, 131 Ill. 68 (1889).

secure the payment of \$950.50, executed and delivered to the plaintiff a mortgage on his undivided interest in the lease and upon all "his interest in the oil wells now thereon and to be by him placed thereon, with all his interest in the structures, fixtures, equipments and appurtenances now on said lease or hereafter to be placed thereon." On the 10th of January, 1881, a copy of the mortgage was filed in the Town Clerk's office, and thereafter it was duly refiled. Subsequently, and on the 24th day of August, 1882, Garrett and Prentice sold and assigned all their rights and interests under the lease to the defendants Alford and Curtis, who thereafter finished one well, put down two others, and added largely to the plant by way of engines, boilers and other machinery.

And the substantial question presented by this appeal is, whether the tubings, casings, engines, boilers, shafting and other machinery purchased and placed upon the property after the giving of the mortgage are embraced within it. True, the appellant contends that his title to the chattels is not burdened with the plaintiff's mortgage, because, as he alleges, Alford and Curtis purchased in good faith and without notice; but this claim is not well founded, for while a search, which failed to disclose the existence of a mortgage, was timely made in the Town Clerk's office, the referee has found upon sufficient evidence to support it, that the mortgage was filed as a chattel mortgage in the proper Town Clerk's office, and within thirty days of the expiration of the year thereafter it was refiled with the statement required by statute. Alford and Curtis are, therefore, chargeable with constructive notice, and the lien of the plaintiff is not affected by their failure to find the mortgage.

In some jurisdictions validity is denied to a contract in so far as it purports to embrace property to be acquired after date. The reason assigned for this holding is tersely stated in Perkins (sec. 65): "It is a common learning in the law that a man cannot grant or charge that which he hath not." In others it is held to be invalid in law and yet operative in equity. Unexplained, this seems to be a solecism, and results from a use of language which fails to accurately convey the idea intended. Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this State (*McCaffrey v. Waudin*, 63

N. Y. 459; *Wisner v. Ocumpaugh*, 71 *id.* 113; *Coats v. Donnell*, 94 *id.* 168-177).

As between the mortgagor, or his assignee, and the mortgagee, therefore, the chattel mortgage operated to create a lien in equity as to the chattels purchased and placed upon the property by the mortgagor subsequent to its date. This lien the trial court rightly enforced by its judgment. But it went further and declared, in effect, that the lien attached to the personalty placed upon the property by the assignees of the mortgagor as well. This, we think, was error. The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not assume or agree to pay the mortgage or carry out its provisions. Indeed, the assignment contained no condition or covenant whatsoever, and the assignees did not even know of the existence of the mortgage. Their acceptance of the lease bound them to fulfill the covenants running with the land (113 Penn St. 83; *Spencer's Case*, 1 Smith's L. C. 145). But it did not, in addition, burden them with the obligation to make good the personal covenants given by the lessee to third parties as security for an indebtedness, because they had constructive notice of the existence of the mortgage the lien of plaintiff can be enforced, and the defendants deprived of the machinery on the premises at the time of the purchase by them of the lease. But the lien provided for by the instrument could in any event only extend to property thereafter acquired by the mortgagor. It could not attach to chattels to which the mortgagor has not acquired either title or possession. Indeed, it does not, by its terms, purport to embrace any other after-acquired property than that placed thereon by the mortgagor.

It follows, from the views expressed, that the judgment should be reversed and a new trial granted, with costs of this court to the appellant, unless, within thirty days, the plaintiff stipulate to modify the judgment by excepting therefrom the articles placed on the property after the assignment to Alford and Curtis, and described in Schedule D., in which event the judgment as modified is affirmed, with costs to the appellant.

All concur except Bradley and Haight, JJ., not sitting.

Judgment accordingly.

THE ROCHESTER DISTILLING CO. v. RASEY.

COURT OF APPEALS OF NEW YORK, 1894.

(112 N. Y. 570.)

Appeal from order of the General Term of the Supreme Court in the fifth judicial department, made October 4, 1892, which reversed a judgment in favor of defendant, entered upon a verdict directed by the court, and granted a new trial.

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April, 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the repayment of money borrowed from him, executed and delivered to him a chattel mortgage; which covered "the grass now growing upon the premises leased, etc.; also all the corn, potatoes, oats and beans, which are now sown or planted, or which are hereafter sown or planted during the next year, etc." At the time, but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes, and all that of the beans, was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops and advertised their sale in August; at which sale plaintiff purchased them. After the levy by the sheriff, Page, the chattel mortgagee, on July 15th foreclosed under his mortgage, gave notice and sold the growing crops to the defendant. Defendant took possession of the property so purchased and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans and for the defendant as to the potatoes and ordered the exception taken to that direction to be heard, in the first instance, at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge and ordered a new trial; but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

GRAY, J. I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opin-

ion, in several cases of a kindred nature, in the reports of this court and of other courts in this State, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated. *Grantham v. Hawley*, Hobart, 133, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases, which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops, as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect, as a reservation, at the time, of the title to the product of the land. That was the case of *Andrew v. Newcomb*, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord, until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax; because the subject was not in existence. He held that the idea of a pledge or of a sale had no application and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (§ 149) "the weight of authority inclines to the view that the lien is an equitable one and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agree-

ment;" and, again, he says "the authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching, or judgment creditors of the mortgagor." About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in presenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity would enforce as against the latter.

In *Bank of Lansingburgh v. Crary*, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain, one, two, or three years previous to its production."

In a subsequent case, the same learned judge considered the nature of a mortgage relating to property not then in existence and its effect as to creditors of the mortgagor. In *Olis v. Sill*, 8 Barb. 102, the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel and all scythes, iron, steel and coal which may be purchased in lien of the property aforesaid." Subsequently, the property was taken under executions issued on judgments and the action was brought for its taking and detention. Paige, J., refers to his opinion in *Bank of Lansingburgh v. Crary*, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property and that no specific lien was created thereby. He says, "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did

amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In *Gardner v. McEwen*, 19 N. Y. 123, the chattel mortgage to the plaintiff, upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey v. Woodin*, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the right of the landlord to do so; holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen* (*supra*), it was remarked that that "is a case between the mortgagee and creditors and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights, as a defense to the plaintiff's (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey v. Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Justices Learned and Bockes, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey v. Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats v. Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs v. Alford*, 120 N. Y. 519,

recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired, but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed, and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.¹

All concur, except Earl, J., not voting.

Ordered accordingly.

¹ *Butt v. Elliott*, 19 Wall. 544 (1873); *Wheeler v. Becker*, 68 Iowa 723 (1886), *contra*. But see *Camstock v. Seales*, 7 Wis. 159 (1858), denying effect to a mortgage of a crop made after planting.

PIERCE *v.* EMERY.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1856.

(32 *N. H.* 484.)

BILL IN EQUITY. The following facts appear from the statements of the bill.¹

The Portsmouth and Concord Railroad, a corporation established under the laws of New Hampshire, made to the complainants, Joshua W. Pierce, Alfred W. Haven, Josiah G. Hadley and to Alexander Ladd, deceased, whose executrix, Maria T. Ladd, is the remaining plaintiff, sundry mortgages, dated respectively February 12, 1850, July 6, 1850, March 10, 1851, May 29, 1851, August 19, 1851, and March 3, 1852, and also made sundry other mortgages to Joshua W. Pierce and Alfred W. Haven, two of the complainants, dated respectively June 26, 1852, July 13, 1852, August 16, 1852, October 15, 1852, November 16, 1852, December 26, 1852, February 12, 1853, June 27, 1854, September 23, 1854, and April 12, 1855.

The mortgages were of personal property, and the bill set forth a description of it as contained in the different mortgages, and specified the debts and liabilities secured by each. By the first two mortgages, made prior to August 20, 1850, besides specific articles named in the mortgages, all the personal property of the railroad was mortgaged; and by the subsequent mortgages the furniture of the road, locomotives, cars, fencing stuff, fuel, and other personal property, were mortgaged from time to time, in some cases to secure debts that accrued before August 20, 1850, and in others, debts which accrued after that date; but none of the mortgages were given on the sale of property to the road for security of the purchase money.

The mortgage of June 26, 1852, conveyed all the right, title and interest of the railroad to the railroad iron imported in the ship General Berry, then belonging to the road, subject to the lien of the United States for duties, being about 591 tons, to secure a note for \$10,000, dated April 26, 1852. . . .

The several mortgages under which the plaintiffs claim remain in whole or in part unsatisfied. All the property described in the mortgages made after August 20, 1850, was purchased by and came to the possession of the road subsequently to that date; and all the property named in the mortgages running to Pierce and Haven,

¹ This statement of facts has been abbreviated.

with the exception of the iron, was paid for with money lent to the road by the parties named in those mortgages, as is stated therein. In all these mortgages it is stated that they were given for the security of the parties named in them respectively. All these mortgages were duly executed and recorded in Portsmouth, which was by law established as the place of business for the road.

On the 13th of July, 1850, the Legislature of this State passed an act entitled "An act to aid the construction of the Portsmouth and Concord Railroad," authorizing the road to issue bonds to the amount of \$350,000, payable, with interest, in not less than ten, nor more than twenty years; the act to take effect when the stockholders should accept and adopt it. . . .

On the 3d of August, 1850, the stockholders met, accepted the act, and authorized the directors to appoint trustees, make a mortgage, and issue bonds at their discretion. On the 20th of August, 1850, the directors made a mortgage to Robert Rice, William Plumer, Jr., and Josiah Minot, trustees for those who were or should become holders of the bonds, to secure payment of bonds to the amount of \$350,000, issued the same day. The original trustees, by death and resignation, are now out of that office, and the defendants, James W. Emery, Thomas L. Tullock and Nathaniel White, are substituted by appointments made under the act and mortgage.

The mortgage deed to the trustees recites that the trustees had been appointed under the act to take and hold security on all the property of said company, and all its rights, franchises, powers and privileges, in mortgage and in trust, for the payment and security of whoever then or thereafter might become the lawful holders of said bonds, or any of them, and conveys to the trustees, in the name of the Portsmouth and Concord Railroad, "the railroad of said corporation, together with all its rights, powers, franchises and privileges," in the towns in which it was laid out, "with all the lands, buildings and fixtures thereto belonging, or which might thereafter thereto belong, with all the rights, franchises, powers and privileges now belonging to and held, or which may hereafter belong to, or be held, by said corporation; together with the locomotive engines, passenger, baggage, dirt, freight and hand cars, and all the other personal property of said corporation, as the same now is in use by said corporation, or as the same may be hereafter changed and renewed by said corporation; to have and to hold the said railroad, franchises and estate aforesaid, whether real or personal, with all the privileges and appurtenances, legislative grants, powers, rights, and privileges, now or hereafter granted, thereto belonging," in trust for the bond-holders, and in mortgage for security of the bonds; and the trustees are empowered by the deed,

on breach of the condition, to sell "the said railroad," and to make all necessary conveyances, "passing all the property, real, personal and mixed, rights, powers, franchises and privileges of this corporation," to the purchaser or purchasers.

On the same 20th of August the directors issued bonds to the amount of \$350,000, from which the road realized \$289,535, and no more. At that time the road owed about \$158,700, and have since expended in constructing and furnishing the road at least \$573,000, and of the debts then owing more than \$100,000 have been paid.

The condition of the mortgage to the trustees having been broken, the present trustees, Emery, Tullock and White, at the request of certain bond-holders, according to the terms of the mortgage, on the 14th day of May, 1855, applied to the directors to surrender to them all the mortgaged premises; and the directors by deed of surrender, dated May 31, 1855, surrendered and transferred to them all the property, rights, powers, franchises and privileges named in the deed of mortgage, to hold according to the terms and conditions thereof. The trustees have taken possession of the road, and under their mortgage claim the property mortgaged to the complainants; and the property has been delivered into the hands of the trustees, under an agreement that it should be used in operating the road, and a compensation paid for it.

The stockholders have voted that it is inexpedient to redeem the road and its property from the mortgage to the trustees, and under the provisions of the mortgage the trustees will be bound to sell, in about eight months from the 31st of May, 1855, and they threaten to include in their sale the property mortgaged to the complainants.

The original trustees, when they took their mortgage, had notice of the prior mortgages, and also many persons who afterwards became purchasers and holders of the bonds.

The present trustees and the Portsmouth and Concord Railroad are the parties defendant to the bill.

The bill prays that the trustees may be decreed to pay the complainants the debt secured by their mortgage, before they sell the property mortgaged to the complainants, and be enjoined not to sell until they pay; or, if allowed to proceed with the sale, may be decreed to pay out of the proceeds the debts secured by the complainants' mortgage, for a foreclosure and for general relief.

PERLEY, C. J.¹ Corporations, as a general rule, have power to sell their property, real and personal, and to mortgage it for the

¹ Portions of the opinion have been omitted.

security of their debts (Com. Dig., Corporation, F, 18; *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 280; *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 206).

Railroads, by the law of this State, are public corporations, so far as to be subject in many respects to general legislation and the control of the public authorities. They are created to answer a public object, and are bound to the State for the performance of their public duty. They can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way which they take and hold for the necessary use of their road.

But they may contract debts; may purchase on credit; and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it. Instead of disabling the road from performing its public duty, a mortgage might assist in doing it, in the same way that other corporations or individuals are aided in carrying on their business by mortgages of their property.

The two mortgages made to the complainants before the mortgage to the trustees for the bond-holders, we think are valid to hold the personal property specifically described in them for the security of so much of the debts as remain unpaid. The bill does not state how much of those debts are still due. But the complainants have no right in the road by virtue of those mortgages; they must assert their security by taking the property away, as in the case of a mortgage by an individual.

A different and more difficult question arises as to the claim of the complainants under mortgages made after the 20th of August, 1850, the date of the mortgage to the trustees for the bond-holders.

The ground taken by the bond-holders is that the act of the Legislature authorized a mortgage, not only of the property which at the time belonged to the road, but of all the franchises and corporate rights of the road, and the road itself; that the trustees under such a mortgage would take, as security for the bonds, the railroad and all its franchises and rights, as one entire thing, and that, as incident to this mortgage of the road and its franchise, all the property, real and personal, which might at any time afterwards become vested in the road, would be covered by the mortgage, and held by the trustees, subject to the right in the directors, until breach of the condition, of managing the road for the benefit of all

concerned, and of selling such of the property from time to time as might be convenient in the course of the business, provided they substituted other property of equal value; that when the trustees should make a sale under their mortgage, all the property, and all the franchises and corporate rights of the road would pass to the purchasers, subject in their hands to the public liabilities and duties of the corporation; that the mortgage deed in this case exhausts the powers conferred by the act, and covers the road and its franchises, and the accruing property, as an accession to the thing mortgaged and as part and parcel of it; that consequently the lien of the mortgage to the trustees attached upon property subsequently acquired immediately upon its vesting in the road, and the claim of the complainants must be postponed to the mortgage made for security of the bond-holders. Whereas, the complainants maintain that the act confers no power to make such a mortgage, and that the mortgage to the trustees does not cover property of the road subsequently acquired.

We take it to be a general rule of the common law that nothing can be mortgaged that is not in existence, and does not at the time of the mortgage belong to the mortgagor (*Tapfield v. Hillman*, 4 M. & G. 240; *Lunn v. Thurston*, 1 M., G. & S. 383; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 Met. 17).

This rule, that a mortgage cannot cover future acquisitions, would seem to have been established on the technical ground that a mortgage is a sale upon condition, and by the common law there could be no sale of a thing not *in esse*, and not at the time the property of the seller.

By the civil law a mortgage may cover the future property of the mortgagor (Domat., part 1, book 3, tit. 1, § 1, articles 5 and 7). And in some jurisdictions where the maxims of the common law prevail, mortgages have been sustained covering the future and shifting stock of a trading or manufacturing establishment; as in the case of *Holly v. Brown*, 14 Conn. 255. So in *Abbott v. Goodwin*, 20 Maine, 408, a mortgage of a stock in trade and of the substituted goods was held to be valid. And such a mortgage was sustained against an assignee in bankruptcy in *Mitchell v. Winslow*, 2 Story, 630. In these cases, not merely the existing property, but also the business and establishment appear to have been regarded as the subjects of the mortgage; and the mortgagor, while he remained in possession, was looked upon in the light of an agent for the mortgagee, so far as his interest was concerned, with an implied authority to buy and sell, and manage generally, according to the usual course of the business.

Even where the strict rule against the mortgaging of subsequently

acquired property is enforced, if the mortgage purport to cover such property, and the mortgagee take possession, with assent of the mortgagor, before another title attaches, he will hold from time to time, not as mortgagee, but as pawnee, under the contract contained in the mortgage (*Rowley v. Rice*, 11 Met. 333). And in mortgages of real estate it is a familiar rule that buildings, and other things annexed to land after the mortgage, are regarded as accessions to the original subject of the mortgage, and covered by it (*Pettingill v. Evans*, 5 N. H. 54).

There is, therefore, no intrinsic difficulty in a mortgage which should cover the future and shifting stock and property of a trading or manufacturing establishment, or of a corporation. But by the common law, according to the weight of authority in other jurisdictions, and as we understand the rule to be in this State, no mortgage can be made to cover any personal property, except specific articles belonging to the mortgagor at the time of the mortgage; and, unaided by the special act of the Legislature, the railroad in this case would have no power to make a mortgage that should have the effect contended for by the bondholders. The question whether the trustees can hold subsequently acquired property against the claim of the complainants, will, therefore, depend on the construction of that act and of the mortgage deed made under it. Did the act authorize the road to make a mortgage which should cover property of the road afterwards acquired? and if so, did the directors make such a mortgage in this instance?

The word "franchise," so often used in the act and in the deed, has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market, or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. In a more popular sense the political right of subjects and citizens are called franchises, like the electoral franchise (Com. Dig., Franchise, F. I.; Angell & Ames on Corp. 3; *The King v. London*, Skinner, 310, 311).

A corporation, being itself a franchise, consists and is made up of its rights and franchises; and when all its franchises are gone, by surrender, by forfeiture judicially ascertained, by limitation of the grant, or in any other way, the corporation has no longer any practical existence. If the franchise or franchises are of a nature to continue after they are lost by the corporation, they may be re-granted to another corporation, or to other individuals; but the former corporation is substantially dissolved (2 Kent's Com. 305,

and note *a*, 308 and 309; *The King v. Pasmore*, 3 T. R. 199; *Com. v. Hancock Bridge*, 2 Gray, 59, 60).

The grant of a corporation is a contract between the State granting it and the grantees. It is peculiarly and emphatically so in the case of railroad corporations, which are created upon public considerations, and clothed with extensive and extraordinary powers, for the purpose of enabling them to accomplish the public object contemplated in the grant. The members and stockholders have private rights; but the corporations are also bound to the discharge of their public duties, and cannot, without the aid of special legislation, disable themselves from performing their duty to the public by alienating or transferring their corporate rights and franchises. They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise (*The King v. The Severn & Wye R. W. Co.*, 2 B. & Ald. 646; *Reg. v. The Eastern Counties R. W.*, 10 Adol. & Ellis, 531; *Reg. v. South Wales R. W. Co.*, 14 Ad. & Ellis (N. S.) 902; *Clark v. Washington*, 12 Wheaton, 46, 54; *Winchester & Lexington Turnpike R. Co. v. Vimont*, 5 B. Monroe, 1; *Arthur v. The Commercial & R. R. Bank*, 9 S. & M. 394).

If this corporation had authority to make a mortgage that should convey the franchise and corporate rights, the power must be derived from the special act. It is a very familiar rule in the interpretation of statutes that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the construction may be even contrary to the letter (*Holbrook v. Holbrook*, 1 Pick. 250; *Somerset v. Dighton*, 12 Mass. 384). On examination of this act it will at once be seen that the several parts cannot all take effect in the sense that would most naturally belong to each, if they were considered separately. In the third section the directors are authorized to mortgage "the whole or a part of the real or personal estate of said corporation." Stopping here, and taking this clause by itself, no inference can be drawn from it of an intention to give the power of mortgaging the franchises or future acquisitions and accessions of personal or real estate. This is the clause in which the authority to mortgage is directly conferred. If a more extensive power were intended to be given by the act, why is no mention made of it here? The argument drawn from this part of the act against the construction contended for by the bondholders, goes upon the ground that this clause was intended to include and define all the powers of mortgaging conferred by the act.

But by the same section the trustees are authorized to sell, according to the conditions and limitations that may be contained in the mortgage deed, "the real and personal estate, and all rights, franchises, powers and privileges named in said mortgage deed." The directors therefore are authorized to *name* in the mortgage deed, not only the real and personal estate, but rights, franchises, powers and privileges of the corporation. The rights and franchises named in the deed are to be disposed of by sale, to enforce the mortgage security in the same way with the property mortgaged; and there is nothing from which it can be inferred that the rights and franchises, and the property of the corporation, are not to be named in the same way and conveyed in the same way by the deed; that is to say, the rights and franchises are to be conveyed and mortgaged like the property, and are to be disposed of under the mortgage for the same purpose, and in exactly the same manner. The directors may *name* in the mortgage—in other words, they may convey in mortgage—any part or all the real and personal property, and any or all the rights, franchises, powers and privileges of the corporation. The act sets no limit on their discretionary power in this respect; and whatever the directors *name* in the mortgage which they give in behalf of the road, is to be disposed of in the same way for the satisfaction of the mortgage debt, whether it be the property or the rights and franchises of the corporation. The power to mortgage the rights and franchises, as well as the property of the corporation, is plainly and necessarily implied from these provisions of the act.

The act, therefore, does not limit the power of mortgaging to real and personal property on hand at the time, but gives authority to mortgage the rights and franchises of the corporation, which could not be done without the aid of the act. And it cannot be maintained that the authority to mortgage real and personal property given in one part of the act, was intended to be exclusive of all further power, when the further power of mortgaging the rights and franchises of the corporation is clearly given by necessary implication in another part of the same section. . . .

The directors then had power under the act to name in their mortgage, and to convey in mortgage to trustees, all the property, and all the rights, franchises, powers and privileges of the corporation. If they made such a mortgage it would convey to the mortgagees all the right and power which the corporation had to acquire and hold property, for the power to acquire and hold property is one of the rights and franchises of the corporation. That right would be conveyed and transferred from the road to the trustees by the mortgage deed, in the same way that the property was conveyed and transferred, subject to the condition of the mortgage.

and the subsequently acquired property would pass under the mortgage as incident to the right of acquiring and holding it, which would be vested in the trustees by the mortgage.

The purchasers under the deed of the trustees "acquire all the rights, franchises, powers and privileges which said corporation possessed, and the use of said railroad, with all its property and rights of property, for the same purposes and to the same extent that said corporation could use the same, if said deeds had not been made, subject to the same liabilities as to the use of said railroad that said corporation would be under if said deed had not been made." All this the purchasers take through a sale authorized to enforce the mortgage security; and we cannot understand that anything different from this, or less than this, was authorized to be mortgaged and covered by the mortgage for the security of the mortgage debts. It is contrary to all the received notions of a mortgage that anything should be sold under it to pay the debts secured, that was not mortgaged and covered by it before the sale.

It would seem to be the plain intention of the act to preserve the corporate rights and franchises, and maintain the corporate liabilities in the hands of the purchasers at the trustees' sale. All the rights and franchises of the corporation, and the use of the road, are transferred to them by the deed of the trustees, and they hold the corporate rights and franchises, subject to the same liabilities as to the use of the road by which the corporation was bound before the sale. They have all the property and all the rights and franchises, and are likewise bound to perform all the public duties of the corporation. It is not easy to see how the original corporation, in the hands of the former corporators, could, after such a sale, have any practical or even legal and theoretical existence. They could hold no property; they could maintain no action, nor elect any corporate officer; these powers are all rights and franchises of the corporation, created and granted by the act of incorporation, and are all transferred and conveyed by the deed of the trustees to the purchasers under their sale. In some cases, after the franchises of a corporation are lost by forfeiture, the corporation is still held to exist in contemplation of law, so far as to be capable of being revived by a regrant from the government. But here the franchises would not be forfeited to the State, but transferred to the purchasers; and the State could not revive the old corporation by a regrant of the franchises, which had become vested in the purchasers. The sale would in substance transfer the road and the corporation to the purchasers.

There may be a difficulty, which it is not necessary to anticipate, in saying how the purchasers shall exercise some of these rights. There is no provision in the act for their doing it through the

machinery of the old corporation. They may, perhaps, be regarded somewhat in the light of new grantees of the old franchises.

If, then, the purchasers under the trustees' sale take what was originally mortgaged, and take all the property, rights and franchises of the corporation, to hold and enjoy as the corporation held and enjoyed them, they take substantially the corporation itself; and the corporation itself was the thing originally mortgaged. . . .

An analysis of the act and an examination of the several parts, when taken together and compared with each other, lead to the conclusion that the Legislature intended to grant the power of mortgaging all the property and all the rights and franchises of the corporation, including the right to property subsequently acquired. We have not been able to discover anything in the act which directly contradicts, or by any necessary implication excludes this construction. There are express grants of particular powers in different parts of the act, from which the argument is drawn, that nothing more than is there expressed was intended to be granted elsewhere. For instance, in one clause authority is given to mortgage all or part of the real or personal property of the road. But it is quite plain from other provisions that this was not intended to be the limit of the authority conferred. The provisions for the sale and transfer to the purchasers under the mortgage of all the rights and franchises are practically inconsistent with such a narrowed construction of the act. The material and substantial provisions of the act cannot be carried into effect without construing it to give the power of mortgaging the road, and all its rights and franchises, as an entire thing, and subsequently acquired property, as an incident to the general subject of the mortgage, and an accession to it.

The general design and object of the act favor the same construction. The corporation already had power under the general law to mortgage their property then in possession, and for that purpose had no need of special legislation. The act must have intended to enlarge that power, and authorize the road to make a mortgage substantially different from such as are allowed at common law; and that intention would not be answered if the act should be so construed as to limit the power of mortgaging to property then owned by the road. The act is entitled "An act to aid in the construction of the Portsmouth and Concord Railroad." The road was unfinished, and the money borrowed on the security of the mortgage was to go into the road, to assist in the enterprise and undertaking. The statements of the bill show that at the time when the mortgage to the trustees was made, all the personal property of the road had been already mortgaged to these complainants for the security of other debts. There is nothing in the

case which furnishes any ground to infer that the road had then any unincumbered property capable of being mortgaged. If so, and the mortgage to the trustees could attach on nothing but property then belonging to the road, all that the bond-holders would have under their mortgage for security of their demands would be a right in equity to redeem property of the road already mortgaged for other debts. This, we think, is not the security upon which the bondholders supposed they were lending their money, nor the security which the Legislature intended to give them by the act. The general design must have been to give those who advanced money to complete the road on credit of the mortgage specially authorized by the act, a substantial and available security, and a preference over other subsequent creditors.

But if all subsequently acquired property might be mortgaged to secure other debts, new and old, and those mortgages were upheld against the bond-holders, money might be obtained on such security to carry on the road, to pay interest on the bonds, or even to pay dividends, and when possession should be taken for the bond-holders, perhaps at the end of ten or twenty years, they might have little for their security but the franchise and road-bed; for much of the iron and other materials since affixed to the road are covered in terms by the complainants' mortgages, and claimed under them. If other creditors of the road had stood on such terms with the directors and managers as would enable them to obtain mortgages of the newly acquired property, as it fell from time to time into the hands of the corporation, the bond-holders, instead of having a preference, would have been the last creditors likely to realize anything from their security, in case the road should turn out to be insolvent.

The object of the act being to give the bond-holders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law as to give the bond-holders security upon the road itself, as the general subject matter of their mortgage, and upon the changing and shifting property of the road as part and parcel by accession, of the thing mortgaged. •

The question is certainly not free from difficulty; but whether we look to the particular provisions, or follow what we must understand to have been the general object and design of the law, we are on the whole brought to the conclusion that it authorized the directors to mortgage, not only the property then belonging to the road, but all the franchises and rights of the corporation, and, in substance, the road and corporation itself. That if the directors made such a mortgage, as incident to the franchise and corporate rights mortgaged, subsequently acquired property, immediately

upon its vesting in the corporation, would, as an incident and by accession, become part of the thing originally mortgaged, and of the mortgage security. The right to take and hold property being one of the franchises mortgaged, the corporation would have no power to take or hold property, except by virtue of that franchise and under the mortgage by which the franchise was covered.

We are of opinion, then, that the act authorized the corporation to mortgage the whole road as an entire thing, with all its corporate rights and franchises, and incidentally, and by way of accession, all the subsequently acquired property of the road. Did the directors in fact make such a mortgage? . . .

Taking the whole deed together the intention is very apparent to mortgage, not merely property then belonging to the road, but the road itself and all its franchises, as one entire thing, and, as an incident and accession, all property of the corporation afterwards acquired. And such we think was the legal operation of the deed under the act. . . .

The demurrer must be overruled, as it is taken to the whole bill, and the complainants are entitled to part of the relief for which they pray. The demurrer may, however, be amended so as to apply to part only of the bill, and the defendants answer to the residue.¹

¹ *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), *accord*. See also *Dinsmore v. Racine & Miss. R. R. Co.*, 12 Wis. 649, 656 (1860); *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114 (1863), and *Pierce v. Milwaukee & St. Paul R. R. Co.*, 24 Wis. 551 (1869).

In *Howe v. Freeman*, 14 Gray, 566 (1860), the Supreme Judicial Court of Massachusetts sustained a mortgage of the road and property of a railroad "and all additions made thereto by adding new locomotives, cars, and other things," on the ground of an express legislative ratification thereof. "This legislative act obviates the second objection to the right to maintain the action—that a mortgage will not pass chattels or personal property not in existence, or not owned by the mortgagor, at the date of the mortgage. The legal principles, stated by the defendant on this point, are entirely correct in reference to ordinary mortgages, and would have been fatal to this action if no legislative authority had intervened, ratifying and confirming this particular mortgage. But the statute did thus intervene, confirming the mortgage, and thus giving effect to all parts of it, including the provision as to after acquired machinery and cars. This mortgage was duly recorded, and thus, by means of the record and the statute, the lien thereby created was duly notified to all persons having business relations with the Vermont and Massachusetts Railroad Company."—*Per Dewey, J.*

The matter is now regulated by general statute in Massachusetts (*Mass. Pub. Stat.*, 1882, Ch. 112, § 72). So in several other States (*Conn. Gen. Stat.*, 1888, § 3572; *Minn. Gen. Stat.*, 1894, § 2724).

MORRILL v. NOYES, 56 Me. 458 (1863). The question whether a mortgage of personal property not in existence, or not owned at the time by the mortgager, can be made available by the mortgagee, as a lien upon property afterward acquired, has been discussed in many recent cases, with some apparent difference of opinion.

Some of the courts have denied that any difference exists, and have attempted to reconcile the cases on the ground that such a mortgage, though void at law, is valid in equity. But this is a loose use of language, that tends more to confuse than to reconcile. If such a mortgage is absolutely void, for want of any subject matter to support it, then it should be so held in equity, as well as at law. But, if not thus void, to what extent, and in what sense, is it valid? It is only by conceding its validity, that it is pertinent to inquire whether the remedy is in equity, or by a suit at law.

In other cases the reasoning is syllogistic and summary. "*Qui non habet, ille non dat.*" A mortgage is a grant. Therefore a mortgage of what one does not own, or of what is not *in esse*, is void. But a mortgage is a grant, to be defeated upon a condition. This makes it merely the creation of a lien, with certain rights to secure and enforce it. A lien may be created without a grant. And sometimes a contract intended as a grant, but ineffectual as such, will be upheld in equity as a lien. So that the syllogism is by no means certain to dispose of the question.

As a general proposition it may be said, that a mortgage of such goods as may be in a store on a future day—or of such furniture as may be in a house—or of such machinery as may be in a mill—or of such stock as may be on a farm—when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired, which can be upheld or enforced in a suit at law (*Head v. Goodwin*, 37 Maine, 181; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Cush. 306; *Otis v. Sill*, 8 Barb. 102; *Gardner v. McEwen*, 19 N. Y. [5 Smith], 123; *Tapfield v. Hillman*, 46 Eng. C. L. 243; *Lunn v. Thornton*, 50 Eng. C. L. 379; *Gale v. Burnell*, 53 Eng. C. L. 850). In Connecticut, a mortgage of a shifting stock of goods in a store, was held to create the same lien upon goods subsequently purchased as upon those owned at the time (*Holly v. Brown*, 14 Conn. 255). A similar decision was made in this State, in the case of *Head v. Goodwin*, 37 Maine, 181. But that case was questioned in *Jones v. Richardson*, 10 Met. 481; and it was substantially overruled in *Pratt v. Chase*, 40 Maine, 269. The question is therefore no longer an open one in this Court.

It should be noticed, however, that in nearly all the cases cited,

the mortgages were exceedingly indefinite. Some of them described no particular property which could be identified; but they were mortgages of mere contingencies of such property as the mortgagers might purchase, if they should purchase any. They were void for uncertainty, if for no other reason (*Winslow v. Merchants' Ins. Co.*, 4 Met. 306). Except the case of *Otis v. Sill*, 8 Barb. 102, they probably would not have been upheld in equity, any more than at law (*Mogg v. Baker*, 3 Mees. & Welsb. 195; *Moody v. Wright*, 13 Met. 17).

We can understand these cases better by referring to another class in which conveyances of property, not in existence at the time, have been upheld, either at law or in equity. And we think it will be seen that sales or mortgages of such property have been sustained when within the following rules:

1. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value?

2. The vendor or mortgagor must have a present, actual interest in it, or concerning it. As is said in illustrating Rule 14. of Bacon's Maxims, "the law doth not allow of grants, except there be the foundation of an interest in the grantor." There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

The application of these principles to the multifarious affairs of a business people, may sometimes be difficult. And in the various enterprises that are likely to be undertaken in a country distinguished for its manufactures, and its domestic and foreign commerce, new applications of them from time to time may be required. But the illustrations to be found in the decided cases will be sufficient for our present purpose.

Thus, one may sell all the wool which shall grow for a term of years on sheep owned by him at the time; but not the wool to be grown on so many sheep, if he does not own them (*Grantham v. Hawley*, Hobart, 132; *Smith v. Atkins*, 18 Verm. 461). So he may sell the grass, or any crop that does not require annual renewal, that shall grow upon his farm for a term of years (*Jencks v. Smith*, 1 Coms. 90; *Bank of Lansingburg v. Crary*, 1 Barb. 347; *Milliman v. Ncher*, 20 Barb. 37).

If one contracts for the construction of a carriage, or a vessel, for himself, and pays therefor, he acquires no title until it is com-

pleted and delivered (*Muclow v. Mangles*, 2 Taunt. 318; *Comfort v. Kiersted*, 20 Barb. 472). But if he *buys* a chattel in process of construction, and it is delivered to him, though afterward to be finished, the title passes, and the additions made to it for the purpose of completing it become his property from the time when they are attached to it. The only reason why the conveyance of a vessel on the stocks was not upheld as a mortgage, in *Bonsey v. Amee*, 8 Pick. 236, was because there was no delivery, and the registry law had not then been enacted, which renders a delivery unnecessary (*Call v. Gray*, 37 N. H. 428). A mortgage of unfinished chattels gives the mortgagee a good title to them when finished (*Harding v. Coburn*, 12 Met. 33; *Jencks v. Goffe*, 1 R. I. 511; *Perry v. Pettigill*, 33 N. H. 433).

So the owner of a ship may assign the freight of a voyage which has been commenced. *In re ship Ware*, 8 Price, 269; *Douglas v. Russel*, 1 M. & K. (7 Eng. Ch.) 488. Or he may sell the oil and cargo to be brought home from a whaling voyage then being prosecuted (*Langton v. Horton*, 1 Hare, 549; *Fletcher v. Morey*, 2 Story, 555). And a laborer, employed by another, may assign his wages afterwards to be earned; but not unless they are to be earned under an existing contract (*Mulhall v. Quinn*, 1 Gray, 105; *Twiss v. Cheever*, 2 Allen, 40; *Lannan v. Smith*, 7 Gray, 150).

In the case at bar, the subject matter of the contract was sufficiently definite and certain; its subsequent existence was reasonably sure; and the mortgagers had an existing interest in, and title to, the other property then mortgaged of which this was to be an essential part. necessary for its use, to be added to it for the purpose of finishing it. It is entirely unlike the case of a changing stock of goods.

The mortgagers had a charter for a railroad, with all the necessary franchises and rights for its construction, equipment, and operation. The mortgagee had previously contracted to construct and equip it for the company; and the work had been commenced. He was to be paid partly in the bonds of the company, which would sell in the market. Thereupon they mortgaged to him, and in trust for the holders of the bonds, their franchise, road, rights of way, materials, buildings, completed or in process of construction, "including all cars, engines and furniture, that have been or may be purchased for or by said company," to secure the contract "for the construction and equipment of said railroad," and to secure the payment of the bonds to be issued to the mortgagee, to him, "or to his assigns, who shall become the holders of said bonds."

A large part of the numerous railroads in this country have been constructed by the aid of mortgages to individuals or to trustees. Many of these mortgages, perhaps most of them, embrace

specifically, engines and cars, to be subsequently acquired. As they are made to secure bonds not to be due for many years, and the rolling stock is perishable, unless such future acquisitions can be mortgaged, as incident to, and essential to the use of, the railroad itself, the security is liable to be greatly diminished. The question is one of great importance in respect to the interests involved in its determination. Nor is it a new one. It has been considered by several courts of the highest respectability; and such mortgages have been sustained, not only as to existing property, but as to that subsequently acquired (*Pierce v. Emery*, 33 N. H. 484; *Seymour v. C. & N. F. Railroad Co.*, 25 Barb. 286; *Trust Co. v. Hendrickson*, 25 Barb. 484; *Coe v. Hart & al.*, 6 Am. Law Reg. 27; *Pennock v. Coe*, 23 Howard, 117; *Phillips v. Winslow*, 18 B. Monroe, 531).

In nearly all these cases the question is discussed with much research and force of reasoning. And, in the absence of contrary decisions, they constitute a weight of authority not to be disregarded, unless it can be clearly shown that they are erroneous.

In some of them, the companies were specially empowered by legislative acts to mortgage their property and franchises. In the case of *Howe v. Freeman*, 14 Gray, 566, such a mortgage was upheld on the subsequent confirming statute, with an intimation that otherwise it would have failed. But the general question was not considered by the Court. The power of a corporation, without any legislative act, to mortgage its franchises with other property, to secure its liabilities, has never been questioned in this State, though such mortgages have been common for many years, and rights under them have been determined in this Court. The weight of authority in this country is in favor of the doctrine that the power to mortgage is incident to the rights granted by the Act of incorporation. . . .

In the case of *Trust Company v. Hendrickson* it was held that, as between mortgagors and mortgagees, the engines and cars were fixtures, so that, without any express grant, they would have become the property of the mortgagees by being attached to the railroad. If they were fixtures, that result would follow, although they were not in existence when the mortgage was given. That they have some of the qualities of fixtures cannot be denied. They are fitted to the gauge of the road, and are adapted to the particular use upon it. In the modern cases, whether an article is a fixture is determined more by such considerations, than by its being actually attached to the land. Without the rolling stock, the road is not only worthless to the company, but it ceases to be of any public use. Important public interests are therefore involved in the question.

But, if the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged, with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it, sufficient to uphold the grant of both together—the one as incident to the other. Their title to the railroad is “the foundation of an interest” in the cars and engines to be acquired for its use.

“If the rolling stock on the road should be removed,” says McLean, J., in the case of *Coe v. Hart*, “it would defeat the liens of creditors to many millions of dollars, and put an end to the construction, if not to the maintenance of railroads.” In the case of *Ludlow v. Hurd*, 6 Am. L. Reg. 493, Storer, J., remarks: “It is very clear that we must regard it (the rolling stock), as appurtenant to a railroad; it is necessary for the working of it that all this species of property should become a part of the road itself. It is essential to its use; and if denied, it is destructive to the purpose for which it was built.” And in the case of *Phillips v. Winslow*, before cited, the Court say that, in order to render the mortgage of the railroad effectual, “it is necessary that it should embrace all such future acquisitions of the company as are proper accessions to the thing pledged, and essential to its enjoyment.”

That a mortgage of a railroad and the franchises of the company, with all the rolling stock then owned and to be afterwards acquired and placed on the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt (*Redfield on Railways*, § 235, notes 21 to 24; *Pierce's Am. Railroad Law*, 531; *Am. Law. Reg.*, July, 1863, 527).

The decisions sustaining such mortgages are not understood to be in conflict with these in which other mortgages of such property have not been upheld. The general rule, that property not *in esse* cannot be conveyed, is not abrogated. Nor will such mortgages be upheld in equity, any more than at law, unless they are within some of the exceptions to the rule. But, if a mortgage is within any of the exceptions it will be sustained, and the parties will be entitled to appropriate remedies.

What remedies will be open to them must depend upon the circumstances of each case. In *Holroyd v. Marshall*, 9 Jur. N. S. 213,

recently decided by the House of Lords, a registered mortgage of machinery in a mill, together with all that should afterward be placed therein in addition to, or in substitution for that which was there at the time, was held to have created a valid lien upon the portion afterwards purchased, from the time when it was brought within the terms of the grant. And the rights of the mortgagee were sustained in equity, on the ground that the mortgagor, as soon as he purchased the additional machinery and put it into the mill, held it in trust for the mortgagee. Whether we should uphold such a mortgage, is a question upon which it is unnecessary to express any opinion. The case seems to be in conflict with that of *Moody v. Wright*, 13 Met. 17. But in those cases in which a mortgage of such property is valid, there would seem to be no doubt that it can be enforced in equity as a case of trust. . . .

Upon the whole case, we are of the opinion that the mortgage to Myers created a valid lien upon the engines and cars as they were purchased and placed upon the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage will be entitled, if they claim it, to have the trust enforced, not only against the railroad, but against the rolling stock subsequently acquired.¹

Plaintiff's nonsuit.

Appleton, C. J., Kent, Walton and Dickerson, JJ., concurred.

PLATT v. NEW YORK & SEA BEACH RAILWAY CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1896.

(9 App. Div. 87.)

Appeal by the petitioner, August Meidling, as guardian *ad litem* of August Meidling, Jr., an infant, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the Clerk of the County of Kings on the 23d day of May, 1896, denying the petitioner's motion to vacate an order appointing a receiver and also a judgment entered in the action, or to modify the same.

¹ *Miller v. Rutland & Washington R. R. Co.*, 36 Vt. 452, 456 (1863); *Farmers' Loan & Trust Co. v. St. Joseph & Denver City Ry. Co.*, 3 Dillon, 412 (1875), *accord.* See also *Palmer v. Forbes*, 23 Ill. 301 (1860). This view has become fixed in several States by statute (Ver. Rev. L. 1894, § 3803; Wis. Stat., 1898, § 1838). Compare *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 314 (1873), and *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311 (1878).

This action was brought for the purpose of foreclosing a mortgage executed by the New York & Sea Beach Railway Company. On January 11, 1896, the plaintiffs in this action procured an order appointing a receiver of said company, and of all the property then owned by it. Subsequently a judgment of foreclosure was entered by which the receivership was continued and a sale directed of all the property in the receiver's hands. Thereupon the appellant, who is a judgment creditor of the New York & Sea Beach Railway Company, instituted this proceeding for the purpose of having the order appointing the receiver and the judgment of foreclosure and sale so modified as to affect only such property as the mortgagor had when the mortgage was executed.

HATCH, J. The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal property purchased subsequent to its execution, as against the petitioner therein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto. By the provisions of the statute (Laws 1850, c. 140, § 28, subd. 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing or operating the railroad. And this authority has been continued in the same language under the revision of the railroad law (Laws 1892, c. 676, § 4, subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage on its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired and whether such property be such as is denominated real or personal. So it was early held that such a mortgage created in equity a lien upon property subsequently acquired superior to the lien of a subsequent incumbrance

by mortgage or judgment (*Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 *id.* 447; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302). In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the Federal courts (*Mitchell v. Winslow*, 2 Story, 630; *Central Trust Co. v. Kneeland*, 138 U. S. 419).

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and if so, was it requisite that the mortgage should be filed as a mortgage of chattels. The Supreme Court divided upon the question, and decisions were rendered both ways. The Court of Appeals, in *Hoyle v. Plattsburg & Montreal R. R. Co.*, 54 N. Y. 314, settled the question by holding that it was personal property, and that the mortgage covering it must be filed as a mortgage of chattels, as prescribed by the act of 1833, or the same would be void as against the general creditors of the corporation. To meet this conclusion, the Legislature, in 1868, passed an act (Laws of 1868, c. 779), providing that it shall not be necessary to file such mortgage, as a mortgage of chattels when it covers real and personal property and is recorded as a mortgage of real estate in each county in or through which the railroad runs. By this act the status of such property, so far as it relates to liens by way of mortgage is made practically subject to the same rules and is placed upon the same footing as real property. The business carried on by railroads, the great extent of territory which they cover, and the fact that the rolling stock is at all times widely distributed, not only throughout the State through which its lines mainly run, but also throughout the different States of the Union, create an essential difference between it and property whose *situs* is practically fixed. This, coupled with the necessity which exists for certainty of securing to those advancing money, usually in very large amounts, upon the faith of railroad property and the practical difficulty, if not impossibility, of a railroad being able to realize upon its property in this manner, if the technical rules respecting liens upon personal property should obtain, evidently created an intent in the mind of the Legislature to make such property subject to the same rules, so far as practicable, as apply to liens upon real property. It is quite evident that if it should be held necessary to constantly revise such a mortgage, in

order to cover what has been, it may be, purchased by the money advanced or to supply operating needs and replenish what is destroyed, it would render such security so doubtful and precarious as not only to impair, but to practically destroy its value. We can see no reason for drawing a distinction in this regard between real and personal property. On the contrary, as the authority for the mortgage of both is derived from the same source, and the same reasons exist why both should be available and answerable as security, we think it more in harmony with the legislative intent to subject it to the same rules (*N. Y. Security Co. v. Saratoga Gas Co.*, 88 Hun, 569). This view does not bring us in conflict with *R. D. Co. v. Rasey*, 142 N. Y. 570. That case proceeded from the well-settled legal rule that a mortgage of chattels, having no actual or potential existence when the mortgage was given, is void as to intervening creditors. For reasons already stated that rule has no application to a mortgage of this character.

It follows that the order appealed from should be affirmed.¹

Order affirmed.

TAILBY v. THE OFFICIAL RECEIVER.

HOUSE OF LORDS, 1888.

(*L. R. 13 App. Cas.* 523.)

Appeal from a decision of the Court of Appeal.²

By a bill of sale made the 13th of May, 1879, H. G. Izon, described as a packing case manufacturer of 87 Parade, Birmingham, assigned to Tyrell for valuable consideration (*inter alia*) "all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being or which during continuance of this security may be in upon or about the premises of the said mortgagor situate at 87 Parade aforesaid or any other place or places at which during the continuance of this security he may carry on business. . . . And also all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor, which fixtures, stock-in-trade, machinery, furniture, chattels, goods, effects and debts are for the most part and as near as may be mentioned in the respective schedules hereunder written."

¹ Affirmed by the Court of Appeals, on opinion below, 153 N. Y. 670 (1897).

² 18 Q. B. D. 25.—*Rep.*

In November, 1884, Tyrrell having died, his executors assigned to Tailby, the present appellant, certain book debts (specified in a schedule) owing to Izon, and among them a debt of about £11 which had become due to him from Wilson Brothers & Co. since the bill of sale, and due notice of this assignment was thereupon given to Wilson Brothers & Co.

In December Izon became bankrupt. In January, 1885, and after the adjudication in bankruptcy Wilson Brothers & Co. paid to Tailby the debt above-mentioned. The official receiver in Izon's bankruptcy afterward sued Tailby in the County Court of Warwickshire for the amount of the debt, as money had and received.

The county court judge gave judgment for the plaintiff on the ground that the assignment of future book debts generally, without any delimitation as to time, place, or amount, was too vague to be supported.

The Queen's Bench Division (Hawkins and Matthew, JJ.) reversed this decision and entered judgment for the defendant.¹ That judgment was reversed by the Court of Appeal (Lord Esher, M. R., Lindley and Lopes, L.JJ.) who restored the judgment for the plaintiff.²

Against this judgment Tailby appealed.

LORD MACNAGHTEN.³ The claim of the purchaser was rested on well-known principles. It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to Messrs. Wilson Brothers & Co.

¹ 17 Q. B. D. 88.—*Rep.* ² 18 Q. B. D. 25.—*Rep.*

³ Portions of the opinion are omitted. The opinions of the Lord Chancellor (Herschell) and of Lords Watson and Fitzgerald, L.JJ., are also omitted.

The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. Starting from that proposition they asked your Lordships to come to the conclusion that the assignment of book debts in the present case was void from the beginning as including in its terms book debts which could not be made the subject of valid assignment. I do not stop to consider whether that is a necessary or legitimate conclusion. It is a startling result certainly, and I shall have a word to say about it by-and-by. At present I am merely inquiring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited its existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned judges who have adopted this view makes it necessary to examine the matter closely. The learned counsel for the respondent gave your Lordships every assistance that ingenuity and industry could supply; and the result of their labors may fairly be summed up as follows: The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd v. Marshall*, 10 H. L. C. 191, no support for it can be found. Possibly it may be evolved from *Holroyd v. Marshall*. Lopes, L. J., seems to think so. It assumed a definite form in *Belding v. Read*, 3 H. & C. 955. It was recognized by Fry, J., in *In re Count D'Epineuil*, 20 Ch. D. 758, and it received the stamp of authority from what was said or implied by two of the learned judges who decided *Clements v. Matthews*, 11 Q. B. D. 808. No other authority or semblance of authority was produced. My Lords, I have read *Holroyd v. Marshall* many times, and I can discover no trace of the doctrine there. *Belding v. Read*, as Bowen, L. J., points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd v. Marshall*. In *In re Count D'Epineuil*, the learned judge, as he stated in *In re Clarke*, 36 Ch. D. 348, thought himself bound by *Belding v. Read*, and simply followed the decision in that case. As for the order made in *In re Count D'Epineuil*, it seems to me to have been only too favorable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, Cotton, L. J., has himself disclaimed the hidden meaning attributed to his judgment in *Clements v. Matthews*.

So much for authority. What foundation is there for the doctrine apart from authority? The learned counsel for the respon-

dent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavoring to maintain the proposition that an assignment by a trader of future book debts not confined to a specified business is too vague to be effectual. Why should this be so? If future book debts be assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence, whether the description be restricted to a particular business or not. Indeed the restriction may render the task of identification all the more difficult. An energetic tradesman naturally develops and extends his business. One business runs into another, and the line of demarcation is often indistinct and undefined. The linendraper of to-day in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily conceive that difficult questions might arise if the book debts assigned were limited to a particular business.

It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business—on that which is admitted to be capable of assignment—in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer which itself is founded on an erroneous view of the principles recognized in this House in *Holroyd v. Marshall*.

My Lords, I should wish to say a few words about *Holroyd v. Marshall*, because I am inclined to think that *Belding v. Reid* is not the only case in which Lord Westbury's observations have been misunderstood. To understand Lord Westbury's judgment

aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd v. Marshall* laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd v. Marshall* was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust" (*Legard v. Hodges*, 1 Ves. Junr. 478). It had also been determined by the highest tribunals in the country, short of this House—by Lord Lyndhurst as Lord Chancellor in England, and by Sir Edward Sugden as Lord Chancellor in Ireland—that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, has recently been introduced by a decision of a most eminent judge, who was naturally less familiar with the doctrines of equity than with the principles of common law. In that state of things, in *Holroyd v. Marshall*, in a contest between an equitable assignee and an execution creditor, Stuart, V. C., decided in favor of the equitable assignee. His decision was reversed by Lord Campbell, L. C., in a judgment which seemed to strike at the root of all equitable titles. Lord Campbell did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence. He held that the equitable assignee did obtain an interest in equity. But at the same time he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor, without the help of some new act to give it substance and strength. It was to this view, I think, that Lord Westbury addressed himself; and by way of shewing how real and substantial were equitable interests springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called,

where the contract is executory, are to be applied to every case of equitable assignment dealing with future property. Lord Selborne has, I think, done good service in pointing out that confusion is sometimes caused by transferring such considerations to questions which arise as to the propriety of the Court requiring something or other to be done in specie (*Wolverhampton and Walsall Railway Company v. London and North Western Railway Company*, Law. Rep. 16 Eq. 433). His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance," are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated. . . .

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound the conclusion attempted to be drawn from it could not, as it seems to me, be maintained.

I have, therefore, no hesitation in concurring in the motion which has been proposed.¹

¹ It is necessary first to consider the principles on which an assignment of property not existing at the time is made effectual. The principle is that such an assignment, as regards the non-existing property, amounts to a contract for value, which a Court of Equity will specifically perform. That was laid down by Lord Westbury in *Hobroyd v. Marshall*; and

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to pay to the appellant his costs in the Court of Appeal and the costs of the appeal in this House; cause remitted to the Queen's Bench Division.

FERGUSON v. WILSON.

SUPREME COURT OF MICHIGAN, DEC., 1899.

(80 N. W. Rep. 1006.)

ERROR TO CIRCUIT COURT. Action by James F. Ferguson, as administrator of the estate of Charles Ferguson, against Henry W. Wilson. Judgment for plaintiff and defendant appeals. Affirmed.

The suit was brought in trover to recover the value of certain personal property.

2.¹ Plaintiff's claim to the property in controversy arises: (1) Under a certain chattel mortgage given by one George Wiggins to Charles Ferguson, plaintiff's intestate, on November 1, 1893, the consideration mentioned being \$150, and conveying one bay horse, one gray horse, one binder, one mower, five yearlings, and one calf. (2) Under a chattel mortgage given by Wiggins to Charles Ferguson, October 27, 1893, and filed in the town clerk's office, November 6, 1893, covering all the crops and stock raised on the farm let by Ferguson to Wiggins on that day, and also all the stock, sheep, cattle, hogs, horses, tools, and machinery that might be used or kept on said farm. This chattel mortgage is contained in a lease given by Ferguson to Wiggins for the farm, and to secure the rent

I should not have gone back to this were it not that there seems to be a misunderstanding as to the application of the doctrine of specific performance in these cases. The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract relates to goods the Court will not in general decree specific performance. Why is this? Because the Court considers that in general damages are a sufficient remedy, and the proper remedy for the breach of a contract to sell or purchase goods, but that does not apply to a breach of a contract relating to land. In the present case the contract is not wholly executory. The mortgagee has performed his part of it by advancing his money on the faith of it, and the principle that damages are a sufficient remedy does not apply."—*Per Cotton, L. J., in In re Clarke, Coombe v. Carter*, 36 Ch. D. 348 (1887).

¹Only so much of the opinion is given as relates to the point under consideration.

thereof. (3) Under a bill of sale of all the property described in the two mortgages above mentioned, given by Wiggins to Charles Ferguson, and dated November 6, 1895. The defendant claimed under a chattel mortgage given by Wiggins to him on February 6, 1893, to secure the payment of \$380, payable \$50 each year for six years, and \$80 seven years from date, with interest at 7 per cent. This mortgage covered the binder claimed by plaintiff to be covered by his mortgage and bill of sale, and certain cattle, sheep, crops on the farm, etc.; and also provided that it should cover "all crops, of whatsoever name or nature, to be sown, planted, and grown on said premises during the years 1893 to 1899, inclusive, also all the increase of the above-described stock, and all other personal property which I may own or acquire during said years." This mortgage was prior in time of filing to the mortgage given by Wiggins to plaintiff's intestate, and was duly recorded in the town clerk's office, and renewed from year to year. The real controversy between the parties arises over the interpretation of the clause in defendant's mortgage, "and all other personal property which I may own or acquire during said years." It appeared that Mr. Wiggins was the owner and was in possession of the property described specifically in the mortgage given by him to the defendant. The court instructed the jury substantially that, as to the articles of property specifically mentioned in his mortgage, there could be no question as to defendant's right and title, but that defendant could not claim a lien under the general clause, "and all other personal property which I may own or acquire during said years" upon the property afterwards acquired, and having no connection with the property owned by him at the time of the giving of the mortgage. It is this last part of the charge of which counsel for defendant complains, his contention being that defendant's mortgage was a lien upon all of the after-acquired property.

It is conceded by counsel for plaintiff that it is settled in this State that one may mortgage after-acquired property, and the mortgage will be upheld; but it is contended that this rule does not apply to goods and chattels subsequently acquired, which have no connection with property actually in existence at the date of the mortgage. This was undoubtedly the view taken by the court below. The general rule in many of the States is that at common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him, as an incident of other property then in existence and belonging to him; that a mortgage on goods which the mortgagor does not own at the time of making the mortgage, though he may afterwards acquire them, is void in respect to such goods as against subsequent purchasers or

attaching creditors; and the rule in Massachusetts and Missouri and some other States is that, if a mortgage be made of a stock in trade, it will not at law cover additions afterwards made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold (*Barnard v. Eaton*, 2 Cush. 294; *Gregory v. Tavenner*, 38 Mo. App. 627). Cases from other States might be cited where the same rule is laid down. In this State, however, it has many times been held that a mortgage on a dealer's stock may be made to cover after-acquired goods; but it is held that they must be brought within its descriptive words, and a mortgage drawn to cover goods to be "added to" the stock or gotten "for use" in the business will not include goods bargained for, but never received at the place of business, or which, on being received, are devoted to some other purpose (*Curtis v. Wilcox*, 49 Mich. 429, 13 N. W. 803). In *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734, the property in question covered by the chattel mortgage was certain horses, wagons, etc., and certain mill machinery, lumber, shingles, posts, and other materials in and about the planing mill of the mortgagor. The mortgage contained the following clause: "And also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business." The property was attached by a creditor, and the mortgagee brought trover. It was held that the clause in the mortgage was valid, even as against third parties; citing *Gay v. Bidwell*, 7 Mich. 525; *People v. Bristol*, 35 Mich. 29; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52; *Cigar Co. v. Foster*, 38 Mich. 368; *Curtis v. Wilcox*, 49 Mich. 425, 13 N. W. 803; *Leland v. Colver*, 34 Mich. 418. In no case, however, has this court held that a clause in a chattel mortgage like the one in the present case, to wit, "and all other personal property which I may own or acquire during said years," creates a valid lien upon after-acquired property not connected with the business in which the mortgagor was engaged, as against subsequent good-faith purchasers or attaching creditors, whatever may be the rule as between the parties themselves. The property in controversy here had no relation to that in possession of the mortgagor at the time of giving the mortgage. He did not then own the property, but afterwards acquired it, outside of the business in which he was then engaged. The case is not like the case of *Eddy v. McCall*, *supra*, nor like the case of *Dunn v. Michigan Club*, 115 Mich. 409, 73 N. W. 386. In the last case it appeared that the mortgage covered all the mortgagor's stock in trade, all book accounts, notes, etc., owned by him or appearing on the books of said business then being conducted by him, "and all future book accounts representing the proceeds of sales of goods

in mortgagor's stock, and all additions to the same." It was held that this covered all future book accounts, though not entered on the books. The court below was not in error in the charge as given. The judgment must be affirmed. The other justices concurred.

CHAPTER I. (*Continued.*)

SECTION III. INFORMAL MORTGAGES.

RUSSEL v. RUSSEL.

COURT OF CHANCERY, 1783.

(1 *Brown Ch.* 269.)

A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the Statute of Frauds.

LORD LOUGHBOROUGH. In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.

LORD ASHURST. Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security.¹

¹ "The case of *Russel v. Russel* is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence which the very object of the Statute of Frauds was entirely to exclude."—Eldon, L. Ch., in *Ex parte Haigh*, 14 Ves. 402. Compare *Ex parte Hooper*, 1 Meriv. 7.

Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9 (1844); *Hackett v. Reynolds*,

EX PARTE KENSINGTON.

COURT OF CHANCERY, 1813.

(2 V. & B. 79.)

Duncan Hunter, on the 19th of March, 1805, deposited with the petitioners, his bankers, several deeds; and signed the following memorandum, addressed to Messrs. Moffatt, Kensington & Styau, bankers, London. "London, 19th March, 1805. Gentlemen, herewith I beg leave to deposit in your house the deeds and policy of assurance upon the following leasehold property;" (describing it) "to remain with you as a collateral security for the balance of any sum or sums of money which you may at any time advance for my account, and which I hereby oblige myself, heirs, or executors, to assign in a legal manner whenever required so to do."

On the 25th of September, 1805, Hunter executed a bond to the same persons, in the penalty of £40,000, with condition for payment to them, and in case of any alteration taking place in their firm, then to the persons composing a new firm, if comprising two of the original members, of all sums thereafter in any manner lent unto or advanced on account of said Duncan Hunter by the petitioners.

In December following, Moffatt retired from the partnership. On the 6th of August, 1807, Hunter, requiring additional advances, deposited with the petitioners the title deeds of an estate, called Cromwell Park; and on the 7th of August signed the following memorandum. "Messrs. Kensington & Co. Gentlemen, I hereby deposit in your hands the title deeds which I hold of Cromwell Park, as a collateral security for any cash transactions which I have had or may have with your house, and which I agree to assign whenever I am required so to do. London, 7 Aug., 1807."

In March, 1809, Hunter, wanting further advances, proposed a deposit of other deeds, of premises held under the Drapers' Company, by lease, at a rent of £100 a year, and agreed to assign to the petitioners his interest in £3000 3 per cent. Consolidated Bank

4 R. L. 512 (1857); *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866); *Gale v. Morris*, 29 N. J. Eq. 222 (1878), *accord*. *Contra* are *Shitz v. Duffenbach*, 3 Pa. St. 233 (1846); *Meador v. Meador*, 3 Heisk. (Tenn.) 562 (1871). The cases in the United States are few and it may be doubted if the doctrine will have much following here. In several Western States the deposit of School Land Certificates, which pass title by assignment, has been held to create an equitable lien. See *Mowry v. Wood*, 12 Wis. 413 (1860); *Jarvis v. Dutcher*, 16 Wis. 307 (1862).

Annuities, invested in the names of the Drapers' Company and him, the said D. Hunter, for securing the due payment of the said rent of £400 and performance of the covenants of the lease; and he signed the following memorandum: "London, 30th March, 1809. Messrs. Kensington, Styan & Adams. I have lodged in your hands the lease and other deeds belonging to the Old Stock Exchange, which are to lay as a collateral security for any advances which you may make for my account, and which I hereby engage and promise to assign over to you, in the regular way, when required, as also £3000 3 per cent. Consols. which are deposited in my name, with that of the Drapers' Company, as a security for the ground rent, and which I hereby acknowledge are also to be transferred or assigned over to you when required."

No further assignments or transfers were made. In July, 1811, Hunter was declared a bankrupt; when, a considerable balance being due to the petitioners, and their application, as mortgagees, for a sale under the general order being rejected by the commissioners, the petition was presented, praying a declaration that the petitioners are to be considered as mortgagees of the estates and the £3000 3 per Cents.; that the commissioners may take an account of the principal and interest due to the petitioners and appoint a sale of the mortgaged premises and the bankrupt's interest in the £3000 stock, and that the moneys to arise from the sales may be applied in reduction of the petitioners' debt, with liberty to prove for the remainder.

Sir Samuel Romilly and *Mr. Wilson*, in support of the Petition. The questions are, whether this deposit of title deeds, with a written agreement, can be held by the petitioners as a security for advances after Moffatt retired: secondly, as to the bank annuities. Your Lordship has gone much further in decision than these circumstances, having held a mutual understanding, with reference to securities in the hands of the creditor, sufficient without any express agreement: *Ex parte Langston*, 17 Ves. 227; 1 Rose, 26, which has been followed in many instances.

The stock cannot be brought within the statute of James I.¹ It is not like a personal chattel, passing by delivery: being in truth a *chose in action*. The bank would not take notice of any trust. To whom was notice to be given? The bank are not the debtors for bank annuities; if, therefore, notice was necessary, it must be given to Government. Is stock, standing in several names, to be considered as the stock of one becoming bankrupt? The effect as to transfers in marriage settlements must be considered. If, however, it could be considered within the statute, that cannot be under these circumstances.

¹ Stat. 21 Jam. 1, c. 19, s. 11.—*Rep.*

Mr. Leach and *Mr. Montague*, for the Assignees. Here is no agreement that this deposit, in March, 1805, should be a security to the new house, formed afterward by a change of the firm. At least there must be a clear verbal contract. Here is no written agreement and no verbal contract of any description.

The stock is within the statute of James I. The books are the best evidence of the apparent ownership.

THE LORD CHANCELLOR [ELDON]. It has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that, whatever I might have thought originally, I must act upon that as settled law. I have often expressed my surprise how it came to be so settled; as judicial decisions are to be found, that a lien upon deeds may exist, without giving any right at law to the estate; and there is a remarkable case in *Peere Williams*, where a prior encumbrancer was held to have the interest in the estate: but the Court would not take away the deeds from a subsequent encumbrancer; allowing all the benefit he could have from those deeds, but giving him no interest in the estate. That decision, however, of *Russel v. Russel*, by Lord Thurlow, has been followed ever since (1 Bro. C. C. 269).

This is the case, not of a mere deposit, but a deposit with a written agreement; which must *primâ facie* determine the purpose of the deposit; and it would be stretching the expression much to construe that as an engagement that would affect the deeds, not only with regard to the money advanced by the old house, but the advances afterward to be made by the house, whenever the partners should be changed. It must therefore be considered as having been originally only a collateral security for any money that might become due from the house, while the partners remained the same.

In the cases alluded to, I went the length of stating that where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be *too thin*, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases.

In this case a bond was given, dated the 25th of September, 1805; at which time they stood with a written contract, affecting these deeds and the estate only to the extent in which Moffatt & Co. should make advances, but with a written contract, arising from the bond, for a personal obligation for the advances, not only of that partnership, but of any other, of which two of the original mem-

bers constituted part. Moffatt retired from the partnership in December following; and this considerable difficulty occurs in the case. Understanding alone, unless in a fair sense amounting to agreement, would not do; and in this case no two of their agreements would admit the same construction. My opinion, however, is, that, if upon the affidavit and examination, taken together, aided by the extreme probability of their intention, I can collect that what was originally deposited for one purpose should be held as deposited also for the other, with reference to the demand of the subsequent partners, that, though by parol, would be sufficient within these cases.

Upon the other question, with regard to the stock, my opinion is extremely clear. When that stock was placed in the hands of Hunter & Co. it was upon a trust, which must exist as long as the lease, to which the agreement refers. The equitable interest was in different persons; one being both trustee and *cestui que trust*. I do not apprehend that the bank would take notice of an agreement to transfer. The bankrupt therefore having only an equitable interest, and no power to make an actual transfer, his equitable interest passed by the agreement, without the legal interest, which he could not part with.

EX PARTE HOOPER.

COURT OF CHANCERY, 1815.

(1 *Meriv.* 7.)

Assignment by the bankrupts, of leasehold premises, by way of mortgage, for securing the sum of £400 and interest.

The bankrupts subsequently becoming indebted to the mortgagee in further sums received by them for his use, an account was stated and settled between the parties, on which a balance of £400 was ascertained, and the following memorandum delivered:

“Hewett and Hopkins, debtors, to Mr. J. Ford, £400 on balance of account due the 12th day of June, 1813.”

The bankrupts farther entered into a parol engagement that the last mentioned £400 should be tacked to the original mortgage; and that as soon as a new lease of the premises could be obtained, a mortgage security for the same should be executed by the bankrupts; but which, owing to the renewal not having been obtained, was never done. Interest was paid on both sums to the 12th of

June, 1814; and on the 8th of December following the commission issued.

The petition prayed a sale of the mortgaged premises, and that, after applying £800 in liquidation of the debt, the residue might be proved; with the usual directions. The single point before the court was, whether or not the petitioners were entitled to tack on the second £400 debt to their mortgage security.

The petition came on to be heard before the long vacation, when the Chancellor, having expressed himself adverse to the prayer, it was requested that it might stand over, and was this day re-argued.

Foulblanc, in support of the petition, compared this to the cases of part performance of agreement to purchase; and, contending that the advance of the £400, in this instance, was such an act of part performance by the testator, referred to *Clinan v. Cooke*, 1 Sch. & Lef. 22, before Lord Redesdale, and the case cited in note, p. 40, to the report of that case, for the rule that, where the whole sum contracted for is paid, that is such a part performance by the vendee as to take the case out of the statute; but not, where only a part. That, in the case of an equitable mortgage, the deposit operates as a lien by reason of the implied agreement.

Montagu, on the same side, referred to the case *Ex parte Langston*, 17 Ves. 227; 1 Rose, 26, as deciding the present, on the ground that an equitable mortgage by deposit of title-deeds must be held to cover subsequent advances, on evidence that they were made upon that security. If the deed had been delivered up, and returned at the time of making the subsequent advance, this would have been clearly an equitable mortgage.

Hart for the assignees.

THE LORD CHANCELLOR [ELDON]. There is an evident distinction between the cases of loan and purchase; and without expressing any opinion on the question, whether in the former case, payment of the whole, or of part of the purchase money, is, or is not, a part performance to take it out of the statute, it is enough to say that the advance of money upon a contract for loan affords, of necessity, no evidence of any intention but that of creating the relation of debtor and creditor.

The doctrine of equitable mortgage by deposit of title-deeds has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, that doctrine is not to be further enlarged. In the present case, the legal estate has been assigned by way of mortgage. The mortgagee is not entitled to say, "I

hold this conveyance as a deposit," because the contract under which he holds it is a contract for conveyance only, and not for deposit. The subsequent memorandum in writing creates nothing more than a debt by simple contract, and cannot be added to by parol.

The cases on this subject have gone too far already; and I would be understood as saying that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction,

The petition dismissed with liberty to file a bill.

STODDARD v. HART.

COURT OF APPEALS OF NEW YORK, 1861.

(23 N. Y. 556.)

Appeal from Supreme Court. The action was to restrain the foreclosure by advertisement, and to compel the cancellation of a mortgage held by the appellant against one Spicer. The trial was before a referee, who found these facts: On the 4th of March, 1852, Spicer procured from the defendant, on the security of the bond and mortgage in question, an advance of \$200 on lumber to be thereafter furnished. The mortgage was recorded on the 8th of March, 1852.

The original condition of the bond and mortgage was for the payment of \$200 and interest on the 15th of June, 1852. At the time the \$200 was advanced, it was agreed between the parties that if Spicer should want more money, the defendant would advance it, and for the purpose of securing it, the amount of such further advance should be inserted in the bond, with the parol agreement that the mortgage should be considered as security for what was thus inserted. Accordingly, within ten days after the mortgage was given, Spicer applied for and obtained from the defendant a further advance of \$180, inserting at the same time in the bond a further condition for the payment of that amount, with interest, on the 1st of June, 1852. The mortgage, which had been in the meantime recorded, was conditioned for the payment of \$200 and interest, with the additional clause: "According to the condition of a certain bond obligatory bearing even date herewith."

On the 12th of July following, Spicer was indebted to the respondent, Stoddard, in the sum of \$500, for rent due and to become due, and with full and specific information from Spicer of

all the foregoing facts, Stoddard took a subsequent mortgage on the premises for the amount of his debt; and afterwards, in January, 1853, he obtained from Spicer a deed of the property, which was received in satisfaction of his mortgage.

On the 25th of February, 1853, the defendant commenced a foreclosure by advertisement, claiming the amount due to be \$380, with interest. The plaintiff, on the 1st of March, tendered as the amount due, the sum of \$200, with interest and costs, and demanded a satisfaction piece, which the defendant refused. The referee decided that the defendant had no lien on the premises except for the \$200 and interest, and that the mortgage should be cancelled on payment of that amount, with costs.

The judgment entered upon the referee's report was affirmed on appeal at general term in the Eighth District, and the defendant appealed to this court.

John K. Porter for the appellant.

E. Peshine Smith for the respondent.

COMSTOCK, Ch. J. In a loose and general sense the equity of this case is on the side of the defendant, because he made the subsequent advance of \$180, it being agreed that this, as well as the original sum of \$200, should be considered as secured by the mortgage. The question, however, is, whether the rules of law will give that effect to the transaction.

It will be convenient first to determine the legal construction and effect of the mortgage, unaided by the parol facts, but read in connection with the bond to which it is collateral. On the part of the defendant it is contended that the two instruments, constituting, as they do, a single security, are to be read as one; and, therefore, that the new advance, being written in the condition of the bond, is it to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the extrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for \$2000 actually loaned, and a mortgage collateral thereto be given for \$1000, the latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, of specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt; the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the

personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specially pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay the \$200, and the further sum of \$180; while that of the mortgage is only to pay the \$200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagor or any one claiming under him not having the rights of *bona fide* purchasers. The title being conveyed by the instrument, the equities of the parties might be adjusted or modified by any new agreement without a writing. But it is entirely settled with us that such is not the nature or effect of a mortgage. With us a mortgage is a lien or security only, and not in any sense a title (*Kortright v. Cady*, 21 N. Y. 343, and cases cited). This ground of sustaining the defendant's lien for the additional advance, therefore, cannot be maintained. The defendant has no title to the land in question; and we have already seen that he has no legal mortgage for a greater sum than \$200.

At the commencement of this suit the defendant was proceeding to foreclose his mortgage, by advertising to sell the premises under the power of sale contained in the instrument; and he claimed in his notice both the sums of money in question. The plaintiff, before instituting the suit, tendered the sum of \$200 secured by the mortgage, according to its terms, with the interest, and the costs which had accrued. From what has been said, it follows that this tender extinguished the lien and the power of sale, and that a sale afterwards made under the power would be a nullity (*Kortright v. Cady, supra*). Of course, we now speak of the lien as a legal one, expressed in the mortgage, and having no other existence.

It is claimed, however, that the defendant acquired some equitable lien or right to charge the new advance upon the land, and that, although such a lien or right cannot be enforced in the manner attempted, because there is no legal power of sale to enforce it,

yet, as the plaintiff asks the interference of a court of equity, he must do all that equity requires as the condition of relief; in other words, he must offer to pay the whole debt in specie to the plaintiff. The argument may be sound if the defendant did acquire any such equitable title or right; and this is the next subject of inquiry.

In England it has long been held that a deposit of title deeds by a debtor with his creditor is evidence of a valid agreement to give a mortgage, which agreement is enforced by treating the transaction as an equitable mortgage. It has always been admitted by English jurists that this doctrine contravenes the statute of frauds, although it has become well settled in the jurisprudence of that country (4 Kent. Com. 151). It is confined there to the precise case of a deposit of title deeds. A mere parol agreement to make a mortgage, or to deposit deeds, does not create an equitable lien. In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner. Equity, however, here as well as there, does sometimes specifically enforce parol agreements which are within the statute of frauds; and I see no reason to doubt that such an agreement to make a mortgage may be enforced when money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse the relief. But, in the present case, the precise difficulty is in the absence of any such agreement. The defendant had loaned \$200, and held a mortgage for that amount. He then advanced another sum: but there was no agreement to make another mortgage, or to change, in any respect, the terms of the one already made. The additional sum was inserted in the bond, with an understanding thereby that the mortgage should be "considered" as a security for that sum also. The instrument, as it was made, was a plain security for \$200; and no change in its terms was contemplated. Nor is there the least pretence that any writing was to be executed creating a special security for the new advance. Now, a loan of money, with a mere understanding that the land of the borrower is a security for the debt, does not create a mortgage, legal or equitable. If it be specifically agreed to execute a legal mortgage, a very different question arises. The deposit of title deeds is evidence of such an agreement. But here there was no agreement to do anything which was not actually done. Consequently, if enough was not done to create a mortgage, then none was created. There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did; but nothing in the transaction was left unfinished of which equity can now decree the complete execution. The question, then, is upon the legal inter-

pretation and effect of the acts done, which, as we have seen, failed to create a lien. The understanding and belief of the parties do not change the law.

For analogous reasons I do not see that the defendant can derive any aid from the doctrine of reforming contracts in equity. If a writing does not truly express the agreement of the parties; if anything was omitted which was agreed to be inserted; or if anything be inserted contrary to their intention, equity will relieve against the mistake by reforming the contract. But in this case no mistake is alleged or proved. Everything agreed upon was done. The subsequent advance of money was to be inserted in the condition of the bond, and it was inserted accordingly. There was no agreement to make a new mortgage, or to change the terms of the existing. It is said the understanding of the parties was that the mortgage should secure this advance also; but it is not pretended that this understanding was to be expressed in any form of writing. If A. should loan money to B., and take a bond with the understanding that the farm of the latter should be considered a security, but with no intention or agreement to make a mortgage or writing of any sort, as the law requires, in order to create a lien, none would be created at law or in equity. The transaction, in judgment of law, would amount simply to a loan upon the bond of the borrower. Such, I think, in substance, was the transaction in question. There was no mistake, unless it be in misunderstanding the legal effect of what was said and done. But even this is not alleged. It is not stated or proved that the parties believed or understood that the insertion of the new loan in the bond had the effect in law of enlarging the mortgage also.

Will a court of equity, then, make a new contract for parties in order to effectuate a mere understanding where no agreement is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud or misplaced confidence? To do so, I think, would be taking a step in advance of the settled rule on the subject, especially if the relief sought be in direct opposition to the statute of frauds. In the case of *Hunt v. Rousmaniere's Executors*, 1 Peters, 1, the general intention of the parties was to effect a security upon a ship at sea equivalent to a mortgage or bill of sale. With that design, a power of attorney to sell was executed, which, as they understood and were advised, accomplished the object in view. As a power merely, the instrument was revoked by the death of the party who signed it, and a bill was filed to reform the writing so that it might stand as a security according to the intention. It was adjudged, in the Supreme Court of the United States, upon the fullest consideration, that the bill could not be

maintained—the ground of decision being that the court could not make an agreement of a different tenor and effect from the one which the parties themselves had intentionally entered into. The case before us seems to me still weaker in its circumstances, because not only was there no agreement for a better security than the defendant actually received, but it does not even appear that he acted under any mistake as to the legal effect of the transaction. The new advance of money was inserted in the bond; but there is no pretence of a belief that this in any respect affected the mortgage. There was a parol agreement that the mortgage should be considered as a security also for the sum thus inserted. The other party might give effect to this agreement in any suit or proceeding against him to foreclose, if he voluntarily chose to do so. But it is not alleged that, under a mistake even of the law, this agreement was supposed to be of any binding force or effect. On the whole, I am of opinion that the defendant's lien, whether viewed at law or equity, was only for the original sum of \$200, and, consequently, that the judgment of the court below is right.

Davies and Mason, JJ., dissented; Hoyt, J., did not sit in the case.

*Judgment affirmed.*¹

ROBERT v. BLISS AND ROBERT.

COURT OF APPEALS OF NEW YORK, 1896.

(148 N. Y. 194.)

Appeal from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 3, 1895, which reversed an order of Special Term confirming the report of a referee in proceedings for the distribution of surplus moneys arising from the sale of mortgaged premises in an action of foreclosure, modified and confirmed as modified said report, by finding that the equities of the claimant Bliss were superior to those of the claimant Robert; that the lien of the deed or mortgage to the claimant Bliss was superior to any claim of the claimant Robert, and that the defendant Bliss was entitled to payment out of the surplus moneys, the balance, if any, to be paid to the defendant Robert.

¹ Where the extension of the mortgage security is in writing, see *Butts v. Broughton*, 72 Ala. 291 (1882).

The facts, so far as material, are stated in the opinion. . . .

ANDREWS, Ch. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for \$1000, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage **should be kept alive**. Subsequently, on July 2d, 1891, Striker **applied to Robert** (a partner of Weil) for a loan of \$1000, on the security of **this extinguished mortgage**, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not as we infer until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28th, 1891, and covered the same premises embraced in the Weil mortgage, and was given to secure a loan of \$1500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11th, 1891. Bliss when he took his mortgage made no search of the title and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the General Term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretence that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to re-issue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this State a mortgage is a lien simply, and the general prin-

ciple is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage, will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and re-issue it as security for a new loan or transaction and especially where the rights of third parties are in question. It would make no difference in our view whether the re-issue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the re-issue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the re-issue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this state.

The Statute of Frauds does not permit mortgages on land to be created without writing. The re-issue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record and re-issue it at pleasure. A party taking from a mortgagor a re-issued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to preference. Upon the facts actually existing he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that incumbrance unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York*, 6 N. Y. 449, is a direct authority upon the question here presented. It was there held that a mortgage after being once paid by the mortgagor cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent judgment creditors. (See, also, *Cameron v. Irwin*, 5 Hill, 272; Jones on Mortgages, § 943 and cases cited.) . . .

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter re-issued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee.¹

The order of the General Term should be affirmed.

All concur, except Vann, J., not sitting.

Order affirmed.

CHASE v. PECK.

COURT OF APPEALS OF NEW YORK, 1860.

(21 N. Y. 581.)

Appeal from the Supreme Court. Ejectment for one hundred acres of land in Otsego County. The plaintiff made title under a sheriff's sale, made June 12th, 1849, upon execution on a judgment against Alonzo Aylesworth, which became a lien on the land in question on the 31st of May, 1848. On the trial it was proved that Alonzo Aylesworth acquired title to the land by deed, from Isaac Howland and Sarah his wife, dated August 11, 1843. On that day

¹ On revival of extinct mortgage by writing, see *Peckham v. Haddock*, 36 Ill. 39 (1864).

they, being very aged persons, conveyed the land to Aylesworth (who was their grandson) for the nominal consideration of one dollar. Nothing was paid in fact, but contemporaneously with the execution of the deed, Aylesworth gave back a writing not under seal, by which he certified that "the said Alonzo hereby pledges the entire use of the farm, this day conveyed to him, for the support of said Isaac and Sarah, and agrees to furnish all necessary support—such as victuals, clothing, medical aid, and all other necessary comforts of life—for both the said Isaac and Sarah; and agrees and binds himself to treat them kindly and wait upon them attentively and in a careful manner, during their natural lives and during the life of the longest liver of them, and should the produce of the farm be insufficient for that purpose, then the entire fee shall be appropriated for that purpose."

Aylesworth had been brought up by the Howlands, and was in his minority at the date of the above conveyance and agreement. They lived together upon the farm, Aylesworth managing it and providing for the support of his grandparents until after the death of Isaac Howland, in 1846. He then became involved in debt, and on the 29th of May, 1848, being insolvent, and several suits against him proceeding to judgment, he reconveyed the premises to Sarah Howland. No other consideration for the reconveyance was shown than that to be implied from the agreement of Aylesworth to support Mrs. Howland and his inability to perform it. The plaintiff claimed that the reconveyance was in fraud of creditors, and there was evidence warranting the jury in finding that an actual fraudulent intention to keep the property from the reach of creditors was a leading motive for the reconveyance. Mrs. Howland lived upon the proceeds of the farm, a fair rent for which was shown to be some \$60 per annum, until she sold it in 1849 to a grantor of the defendant; neither Aylesworth, nor any person in his behalf paying anything, or rendering any service toward her maintenance. She died after the commencement of this suit and before the trial. The jury found a verdict for the plaintiff, and the judgment thereon was affirmed at general term in the sixth district. The defendant appealed to this court, where the case was submitted on printed arguments.

DENIO, J. The determination of this case will depend upon the character of, and the effect to be attributed to, the instrument executed by Alonzo Aylesworth to Isaac and Sarah Howland, at the same time that the latter conveyed to him the premises in controversy. From the two papers, taken together, it is apparent that it was parcel of the consideration, upon which the conveyance was executed, that Aylesworth, the grantee, should support the grantors during their joint and several lives. The paper signed by him pro-

fesses, in the first place, to pledge the entire use of the farm for that purpose; and it is added that, if its produce shall be insufficient for the object, the entire fee shall be appropriated to accomplish it. It was, probably, intended that the transaction should operate, to a certain extent, as a gift; but this was only so far as the value of the property conveyed should exceed the value of the return which was to be made for it. As respected the latter, the arrangement was a contract, which imposed a certain duty upon the grantee, to be performed for the benefit of the grantors, and which, moreover, attempted to create a lien upon the subject of the conveyance, to secure the performance of the duty undertaken by the grantee. The intention of the parties is plain; but the question to be considered is, in what legal or equitable light the arrangement is to be regarded by the court. In our opinion, the instrument signed by Aylesworth is to be considered as creating an equitable incumbrance in the nature of a mortgage.

By the law of England, as administered in the Court of Chancery, an equitable mortgage may be created by any writing from which the intention to create it may be shown; or it may be effected by a simple deposit of title deeds without writing. It will also be allowed in favor of a vendor, for unpaid purchase money, or of a purchaser who has advanced his money on the faith of a contract for a conveyance (Miller on Equitable Mortgages, pp. 1, 2, 218, and cases cited).

The courts of equity in this State have adopted the general doctrines of the English Chancery upon this subject, as upon many others. The cases of a mortgage created by a writing not sufficient to convey the premises, or by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or *dictum* by which it has ever been questioned. In *Jackson v. Dunlap*, 1 John. Ca. 114, a vendor of land had executed and acknowledged a conveyance to the vendee, but a part of the purchase money had not been paid, and it was then agreed that the grantor should retain the deed until the balance should be actually paid. It was equivocal upon the testimony whether the deed had been delivered so as to pass the title or not. If it had not been, the question we are considering would not arise; but Kent, Ch. J., considered the delivery complete, and that the deed was then retained by the grantor by way of security, till payment. This, he said, was the creation of an equitable lien in the grantee. The other judges seem to have been of opinion that the title did not pass. In *Jackson v. Parkhurst*, 4 Wend. 369, it was held by the court, Judge Sutherland giving the opinion, that the pledge or deposit of a deed with the grantor, by way of security, would give him a lien in the nature of a mortgage;

but the case being at law, it was held that such a title could not be set up against the legal estate. In *The matter of Howe and wife*, 1 Paige, 125, the English doctrine, that an agreement for a mortgage is in equity a specific lien on the land, was asserted and applied by Chancellor Walworth.

The cases in which a lien for the purchase money has been established, where the title had passed to the purchaser, are more numerous (*Garson v. Grear*, 1 J. C. R. 308; *Warner v. Van Alstyne*, 3 Paige, 513; *Arnold v. Patrick*, 6 Paige, 310; *Hallock v. Smith*, 3 Barb. S. C. R. 267). These cases proceed upon the same principle which the defendant seeks to establish. The difference in circumstance which exists in the present case is against the plaintiff; for Mr. and Mrs. Howland received back from Aylesworth a written instrument, in which the lien reserved was explicitly stated, while, in the cases referred to, the lien was predicated on the implied intention of the parties without a writing or even a verbal agreement for that purpose. Another example of the same doctrine is furnished where there is an executory contract for the purchase of lands, the title remaining in the vendor; and subsequently to the contract he suffers liens upon the premises to be created. It is well settled that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer who has advanced money or property without notice of the vendee's equity (*Lane v. Ludlow*, 6 Paige, 316, note; *Parks v. Jackson*, 11 Wend. 442). In such cases, the vendee is considered in equity as the owner, and the vendor as his trustee.

Assuming that it has been shown that Sarah Howland occupied the position of a mortgagee of the land to secure the agreement of Aylesworth to support her during her life, the next inquiry is, whether the plaintiff, by recovering a judgment against him and purchasing the premises on the execution, is in a better situation than he would have been were she, or her representatives, now asserting a claim against him to subject the premises to the payment of a compensation for the provision which he had failed to make. Upon this point, the cases already referred to for another purpose, and many others, are entirely decisive. It will be sufficient to mention the case *In the matter of Howe*, and that of *Arnold v. Patrick*, which are full to this purpose. In the last case, the equitable lien for the balance of the purchase money was established against a judgment creditor who had sold the land on execution, and had himself become the purchaser. The chancellor said the plaintiff in the judgment was not entitled to claim protection as a *bona fide* purchaser, even if he had no notice of the facts establishing the equitable lien; "for," he added, "he bid in the property on his own judgment for an antecedent debt, paying no new consideration

He, therefore, took the legal title under the sheriff's sale, subject to the equitable lien for the unpaid purchase money."

Considering the rights of the parties to be such as have been mentioned, and the fact being that the defendant is in possession under Sarah Howland, the remaining question is, whether the plaintiff can maintain ejectment on his legal title against a party clothed with her equitable interest. It is well settled, that a mortgagee in possession, the mortgage being forfeited by non-payment, can defend himself in a possessory action brought by the mortgagor, though, if he were out of possession, he could not now maintain ejectment against the latter (*Phyfe v. Riley*, 15 Wend. 248). But this, I think, is not so, except in the case of a technical mortgage, conveying, subject to the condition, a legal title to the premises (*Marks v. Pell*, *Jackson v. Parkhurst*, *supra*). If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from Aylesworth to Mrs. Howland has been found to be fraudulent, I think the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles; and if, upon the application of these principles, the plaintiff ought not to be put into possession of the premises, he cannot recover in the action. It has been shown that the premises were, in effect, mortgaged to Howland and his wife to secure the performance of Aylesworth's agreement to support them and the survivor of them during life, and that the plaintiff has taken the place of Aylesworth. When he obtained title by the execution of the sheriff's deed, Aylesworth had been in default in the performance of his agreement for nearly three years. Mrs. Howland and her grantees, it is true, had been in possession, and had enjoyed the use of the premises, but no account has been taken to show how far the income derived from that source would go in fulfilment of the agreement. This action is not brought for a redemption, and is not adapted to that kind of relief. It would be manifestly inequitable to let the plaintiff into possession until he shall procure an account to be taken, and shall pay or tender the amount which shall be found in arrear upon the above mentioned agreement, executed by Aylesworth, for the support of Mrs. Howland up to the time of her death.

The judgment of the Supreme Court must be reversed; and, as we cannot certainly say what case the plaintiff may make, now that the legal principles which govern the action have been determined, there must be a new trial, with costs to abide the event. If the main features of the case cannot be changed, the only remedy

for the plaintiff is to institute a suit for redemption, upon the principles which have been mentioned.¹

All the judges concurring.

Judgment reversed, and new trial ordered

BURDICK v. JACKSON.

SUPREME COURT OF NEW YORK, GENERAL TERM, 1876.

(7 Hun, 488.)

Appeal from a judgment entered on the report of a referee dismissing the complaint.

The action was brought by the plaintiff as assignee in bankruptcy, to set aside a mortgage given by the bankrupt to his creditors, the defendants, Ida J. Jackson and Carrie A. Jackson, on the ground that it was a fraudulent preference under the bankrupt act. The mortgage was executed eighteen days before the filing of the petition in bankruptcy, but was given in pursuance of a prior agreement between the bankrupt and the guardian of the infants more than fifteen months before.

This appeal was argued at the January term, 1875, and a re-argument ordered at the October term following.

GILBERT, J. We concur fully with the referee in his conclusions of fact and of law. One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held that an agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land (Story Eq. Jur., § 553; *Russell v. Russell*, 1 Bro. C. C. 269, and notes to that case in 1 Lead. Cases Eq. 541; *Read v. Simons*, 2 Desauss. 552; *Welsh v. Usher*, 2 Hall Eq. 167; *Dow v. Ker*, 1 Spen. Eq. 414; *Bank v. Carpenter*, 7 Ohio, 71; *In re Howe*, 1 Paige, 125; *Chase v. Peck*, 21 N. Y. 581; Willard Eq., Potter's ed. 441, *et seq.*). If, therefore, the agreement of December, 1871, had been made directly with the defendants, Ida and Carrie, there can be no question that it would have given them a specific equitable lien upon the land in controversy, which would have been prior and paramount to the title of the plaintiff and to

¹ *Hall v. Hall*, 50 Conn. 104 (1882).

the general liens of the judgment creditors whom he represents. Having been made with their guardian while they were infants, it inured to their benefit and was well executed by the mortgage to them. Conceding that while the agreement remained executory it was within the statute of frauds, and so not enforceable for the reason that it was not in writing, yet, when the promisor actually executed the agreement by the delivery of a formal mortgage, all objection to its validity, on that ground, was removed, and the agreement became as effectual for all purposes as if it had been reduced to writing originally (*Siemon v. Schurk*, 29 N. Y. 598; *Dodge v. Wellman*, 1 Abb., Ct. App. Dec. 512; *In re Howe*, *supra*; *White v. Carpenter*, 2 Paige, 217; *Arnold v. Patrick*, 6 *id.* 310). Under our statute a parol agreement in respect to lands cannot be avoided in equity because it is not in writing, where there has been a part performance of it (*Freeman v. Freeman*, 43 N. Y. 34). *A fortiori*, it cannot where it has been fully executed. The plaintiff is not a *bona fide* purchaser, but stands in the shoes of the bankrupt. He cannot, therefore, assert any better right than the bankrupt himself. The execution of the mortgage gave the defendants a lien, which took effect, by relation, as against the bankrupt and purchasers from him with notice, at the time the agreement to give it was made. The plaintiff, not being a *bona fide* purchaser, took the transfer to him subject to that lien. That being so, no question of fraud or of a preference in violation of the provisions of the bankrupt act has arisen, and the evidence precludes any inference of other kinds of fraud. It is unnecessary to review the cases cited on behalf of the appellants, for none of them seem to us to conflict with the foregoing views.

The plaintiff is not in a position to raise the objection that the agreement to discharge the old mortgage and to receive the new one in lieu of it was invalid because the guardian violated his duty and transcended his power in making such an agreement. Such a transaction is not absolutely void, but is voidable only, at the election of the infants on coming of age. It being obviously for the benefit of the infants that the lien shall be established and upheld, we will give effect to the intendment that their ratification will be forthcoming at the proper time and to the rule that no one but themselves can disavow the authority of their guardian to make the agreement (Co. Lit., 2 *b*; 2 Kent Com. 236; *Keane v. Boycott*, 2 H. Bl. 511; *U. S. v. Bainbridge*, 1 Mason, 82). The plaintiff has no claim to be the champion or protector of the infants and can acquire no rights by assuming that character.

Some objections to the admission of evidence were taken by the plaintiff. We think they were properly overruled.

The judgment should be affirmed, with costs, to be paid out of

the estate of the bankrupt, if that is sufficient; otherwise by the plaintiff personally.

Smith, J., concurred.

Mullin, P. J., concurred solely on the ground that it was shown on the trial that the defendants were not at the time of receiving the mortgage aware of the insolvency of the mortgagor, and that the mortgage, as to them, was in fraud of the bankrupt law.

Judgment affirmed, with costs.

AHREND v. ODIORNE, 118 Mass. 261 (1875). GRAY, C. J. The plaintiff principally relies upon the doctrine of the English courts of chancery that the vendor of real estate by an absolute deed has a lien thereon for the unpaid purchase money, without proof of any agreement of the parties to that effect.

The earliest case which contains a full discussion of the doctrine, the source from which it is derived, and the reasons and authorities by which it is supported, is *Mackreth v. Symmons*, 15 Ves. 329, decided by Lord Eldon in 1808. If, as the learned chancellor thought, "the doctrine is probably derived from the civil law as to goods," it is somewhat remarkable that it was never applied in England except to real estate (Adams on Eq. 127). The only grounds upon which it has been rested are natural equity; a supposed intention of the parties; and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price.

It was forcibly argued by counsel in *Blackburne v. Gregson*, 1 Cox Ch. 90, 100; s. c. 1 Bro. Ch. 420, and not answered by the court. "As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

The presumption of an intention of the parties has been well disposed of by Chief Justice Gibson: "The implication that there is an intention to reserve a lien for the purchase money, in all cases in which the parties do not by express acts evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of everything that can pass" (*Kauffelt v. Bower*, 7 S. & R. 64, 76, 77).

The theory that a trust arises out of the unconscientiousness of

the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*.

The earliest cases upon this subject in England were decided long since the settlement of Massachusetts; and in all those decided before our Revolution (except *Bond v. Kent*, 2 Vern. 281, in which the purchaser secured part of the purchase money by mortgage and gave a note payable on demand for the rest, and it was held that the amount of the note was not a charge upon the land; and *Gibbons v. Baddall*, 2 Eq. Cas. Ab. 682, *note*, which is very briefly stated, without indicating when or by whom it was decided, in a volume called by Lord Eldon a "book of no very high character;" *Duffield v. Elwes*, 1 Bligh. N. R. 497, 539), either the conveyance was retained in the custody of the vendor as security for the payment of the purchase money, as in *Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; *Fawell v. Heelis*, Amb. 724, 726; *Coppin v. Coppin*, Sel. Cas. in Ch. 28; *S. C.* 2 P. Wms. 291; or the statements of the general doctrine were *obiter dicta*, as in *Harrison v. Southcole*, 2 Ves. Sen. 389, 393; *Walker v. Preswick*, *ib.* 622; *Burgess v. Wheate*, 1 W. Bl. 123, 150; *S. C.* 1 Eden, 177, 211.

Lord Eldon himself, in *Mackreth v. Symmons*, said: "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the seller should suffer for the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist" (15 Ves. 340). But he felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently; that if some of the cases, that had been determined, had come before himself, he should not have been satisfied that the conclusion was right; and that it was "obvious that a vendor taking a security, unless by evidence, manifest intention or declaration plain he shows his purpose, cannot know the situation in which he stands, without the judgment of a court how far that security does contain the evidence, manifest intention or declaration plain upon that point" (15 Ves. 342).

So Mr. Justice Story, in *Gilman v. Brown*, 1 Mason, 191, 221, 222, upon a review of the English cases, concluded that the right of the vendor was not "an equitable estate in the land itself, although sometimes that appellation is loosely applied to it;" but "a

right which has no existence, until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles."

The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases or to a limited extent, taken in execution for debt (2 Bl. Com. 169, 164; 4 Kent. Com. 12th ed., 428, 429).

But by an act of Parliament, passed in 1732, lands and other real estate within the English colonies were made chargeable with debts and subject to like process of execution as personal property (Stat. 5 Geo. II., c. 7, § 4). And in Massachusetts lands had been made subject to attachment, as well as execution, by successive statutes of the Colony and Province, reaching back almost to the time of the first settlement (Col. Sts. 1644, 1647; 2 Mass. Col. Rec. 80, 294; Mass. Col. Laws, ed. 1672, 7, 104; Prov. St. 1696, 8 W. III., 10; 1 Mass. Prov. Laws, State ed., 254; Anc. Chart. 49, 154, 155, 222; 5 Dane Ab. 23). There is much less reason therefore for adopting the doctrine in this Commonwealth than in England (*Wamble v. Battle*, 3 Ired. Eq. 182; *Wragg v. Comptroller General*, 7 Desaus. 509).

In *Gilman v. Brown*, 1 Mason, 191, 219, Mr. Justice Story said: "Nothing can be clearer than that by the law of Massachusetts no lien in any case whatever exists upon land for the purchase money." In the argument of the same case on appeal, this was admitted on both sides (*Brown v. Gilman*, 4 Wheat. 255, 264, 273) and the Supreme Court, in the opinion delivered by Chief Justice Marshall, expressed no doubt upon that point. Mr. Dane also says that no such lien exists in Massachusetts (9 Dane Ab. 159).

It is true that in their time this court had a very limited jurisdiction in chancery. But ever since 1836 it has been vested with full equity jurisdiction over all trusts, express or implied (Rev. Sts., c. 81, § 8, & commissioners' notes; *Wright v. Dame*, 22 Pick. 55; Gen. Sts., c. 113, § 2). During this period of almost forty years, only two attempts have been made to invoke the exercise of this jurisdiction in cases at all analogous to the present. In *Wright v. Dame*, 5 Met. 485, 503, the general question of vendor's lien was argued; but as the facts of the case showed an express trust, it was not decided. But the opinion of the court in *Hunt v. Moore*, 6

Cush. 1, 3, strongly tends to the conclusion that the failure of a purchaser of land to pay the consideration agreed could not create an implied or resulting trust. The suggestion, at the close of that opinion, that a court of full equity powers might perhaps afford the plaintiff relief, did not relate to the trust relied on, but to an allegation of fraud, of which, as a distinct head of equity jurisdiction, this court had no cognizance until the passage of the St. of 1855, c. 194.

The English doctrine of vendor's lien has been adjudged not to exist in Maine (*Philbrook v. Delano*, 29 Maine, 410, 415). And it does not appear to have been ever adopted in any of the New England States, except Vermont, in which, after being affirmed by the court, it has been abolished by the Legislature (*Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Dean v. Dean*, 6 Conn. 285; *Atwood v. Vincent*, 17 Conn. 575; *Manly v. Slason*, 21 Vt. 271; St. of Vt. of 1851, c. 47; Gen. Sts. of Vt. of 1862, c. 65, § 33).

In *Brown v. Gilman*, 4 Wheat. 255, 290, Chief Justice Marshall treated the question as governed by the consideration whether the doctrine had been adopted by the law of the particular State. And the doctrine has never been affirmed by the Supreme Court of the United States, except where established by the local law, as, for instance, in Ohio (*Bayley v. Greenleaf*, 7 Wheat. 46; *Tiernan v. Beam*, 2 Ohio, 383), in Georgia (*M'Lean v. M'Lellan*, 10 Pet. 625, 640; *Harden v. Miller*, Dudley, 120), and in the District of Columbia (*Chilton v. Brand*, 2 Black, 458); the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district had been formed (*Moreton v. Harrison*, 1 Bland, 491; *Redford v. Gibson*, 12 Leigh, 332); although it has since been abolished in Virginia by statute (*Yancey v. Mauck*, 15 Grat. 300).

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed., c. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this Commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why

equity, any more than the common law, should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts in those courts which recognize the existence of a vendor's lien for unpaid purchase money (1 Perry on Trusts, § 235). But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmance.

PERRY v. BOARD OF MISSIONS.

COURT OF APPEALS OF NEW YORK, 1886.

(102 N. Y. 99.)

Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 4, 1884, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to have a lien declared in the nature of a mortgage upon certain premises, the title to which is in the defendant, for moneys advanced by plaintiff to pay for repairs and improvements upon said premises.

The material facts are stated in the opinion.

E. Countryman for appellant.

Hamilton Harris for respondent.

DANFORTH, J. Upon trial before a referee the plaintiff has been declared entitled to a lien in the nature of a mortgage upon certain premises on Elk Street, in the city of Albany, for a balance due him for advances made for improvements and repairs thereon and for interest on an existing mortgage, amounting to the sum of \$4677.38, besides costs, and in case the same is not paid within a certain time, that said real estate be sold in the same manner as sales are made upon mortgage foreclosure, and, of the proceeds of such sale, the plaintiff be paid the amount of said lien, with interest as aforesaid, together with his costs and disbursements. Upon appeal to the General Term the judgment upon this report was affirmed.

Some objections were made by the defendant to the admission of certain testimony, but it is not now contended that the facts found by the referee are not warranted by the evidence, or that

they were not within the issues raised by the pleadings. The contention is against the referee's conclusion of law. It appears by his report that in September, 1869, the Right Reverend William Croswell Doane was bishop of Albany, and at that time by the action of the convention of the Protestant Episcopal Church in that diocese a committee was appointed to take such steps as they might deem expedient for procuring a residence for the bishop; that in February, 1870, the vestry of St. Peter's church, in that city, appointed a committee, of which the plaintiff was chairman, to solicit subscriptions for the above purpose, and in that character he received moneys from various persons, in all to the amount of \$12,825, and in June, 1870, under the advice of the bishop, and with the consent of the diocesan committee, he bought the premises above referred to at the price of \$18,000 (of which \$5000 was in a then existing mortgage). He paid the residue, and upon like consent caused the property to be conveyed, subject to the mortgage, to a corporation called "The Trustees of the Episcopal Fund of the Diocese of Albany;" that thereupon "plaintiff, at the request of the bishop, commenced making various improvements, alterations and repairs in the dwelling upon the premises so purchased, all of which were necessary and proper to make it a suitable and convenient residence for him, and the plaintiff advanced the moneys required to pay the bills for such improvements and repairs; that at the annual meeting of the diocesan convention, in September, 1870, the diocesan committee made a report which stated the manner in which the title was taken, described the property and referred to the repairs and improvements. This report was, on motion, accepted." And at the same time the convention, with the consent of the trustees of the Episcopal fund, directed them to transfer the title to said property to the defendant herein, "to be held and used for the support of the Episcopate, and be a place of residence for the bishop of the diocese, and that the said board of missions be authorized and directed to make a bond and mortgage on the premises to secure the payment of the incumbrance thereon, of \$5000, and also the payment of the sum advanced for the repairs and fitting up of the same for the Episcopal residence," intending thereby to provide for and cover all the expenditures incurred by plaintiff for the improvements and repairs then in progress, and contemplated and included, as well the sums thereafter advanced as those which had then been actually paid.

The defendant is a corporation having power, among other things, to take and hold property used or intended to be used for "diocesan institutions or purposes in the said diocese," and is subject to the directions and instructions which shall be given to it by the said convention (Laws of 1870, c. 13).

At this time the repairs and improvements were in progress, and only the sum of \$173.92 had then been advanced by plaintiff in payment therefor. On the 20th of October, 1870, in accordance with the above directions, the trustees of the Episcopal fund of the diocese of Albany conveyed the premises to defendant in trust as a residence for the bishop of Albany, and on the same day, at a regular meeting of the board, the following resolution was passed:

"*Resolved*, That this board do, in accordance with the direction of the convention, hereby accept the conveyance of the said premises, to be held in trust for the uses and purposes above mentioned, and further that the president of this board, the Rt. Rev. William Croswell Doane, S.T.D., Bishop of Albany, be and is hereby authorized in its name and behalf to execute and affix the corporate seal of this board to a bond and mortgage upon the said premises for a loan not to exceed \$8500, with interest, the proceeds of which shall be applied to the payment of the said existing mortgage of \$5000 thereon, and the said expenses of the said repairs and improvements," and in pursuance of said resolution on December 30, 1870, defendant, by its president aforesaid, executed and delivered to one Earl L. Stimson a bond with a mortgage upon the premises aforesaid for the sum of \$8500, which sum was loaned and advanced to it by said Stimson, and was by it paid over to plaintiff, who paid out of the same the mortgage of \$5000, and the interest thereon, then unpaid, amounting in all to the sum of \$5220.47, and the same was cancelled of record, and the balance of said sum was credited and applied by plaintiff in his account for the advances made by him as aforesaid toward the purchase price of said premises, the expenses incident to the same, and for said improvements and repairs.

Other facts are found which require no special mention, but which show that the amount for which a lien was declared was justly due for advances made under the circumstances above stated.

It is objected by the appellant that the plaintiff is not, by reason of any of these facts, entitled to an equitable lien upon the premises for the benefit of which they were made. We are of a different opinion.

The principle upon which a court holds that a vendor who has not been paid is entitled to a lien on the land sold is that it would be contrary to natural justice to allow a purchaser to retain an estate which he has not paid for, and it seems very clear that there is a like natural equity in favor of the plaintiff. It is true he did not sell the estate, but he added to it, and by his expenditures upon it fitted it for the purpose for which it was intended. A lien for

the price of an estate sold exists without any special agreement and by virtue of a doctrine merely of a court of equity. Here there is a special agreement and also a case to which the doctrine applies:

First. The special agreement. It may be found in the resolution of the convention of 1870, by which the defendant was required in substance to provide by bond and mortgage "for the payment of the sum advanced for the repairs and fitting up of the Episcopal residence"—the one in question. The learned counsel for the appellant seeks to limit this expression by the rules of grammar, and confine the security to the sum then or already advanced, to the exclusion of all advances subsequent thereto. We do not think, however, that the framers of the resolution selected the word for the purpose of marking either present or future time, but to denote a fact which might include various transactions requiring the expenditure of money by some person other than themselves, the whole, by whomsoever or whenever made, constituting "the sum advanced," in rendering the place fit and suitable as a residence for the bishop of the diocese. The resolution in question was in writing; it was entered in the journal of the convention, and the defendant was bound to conform to it (C. 13, Laws of 1870, *supra*).

Second. The plaintiff's case is within the general doctrine of equity, which gives a right equivalent to a lien, when in no other way the rights of parties can be secured. The advances were directly for the benefit of the real estate; they were approved by the convention by whose directions the title was conveyed to the defendant, but neither the convention nor the defendant have incurred any corporate liability, and while it may be said that the advances were made on the promise of, or in the just and natural expectation that, a mortgage would be given, it is also true that they were made on the credit of the property, for the improvement of which they were expended. The repairs and improvements were permanently beneficial to it, made in good faith, with the knowledge and approbation of the parties interested, and accepted by them, not as a gratuity, but as services for which compensation should be given. The plaintiff's right to remuneration is clear, and unless the remedy sought for in this action is given, there will be a total failure of justice.

It would seem to follow that no error was committed by the referee in directing a sale of the property, and the application of the proceeds to the payment of the plaintiff's claim. But the learned counsel for the appellant argues that as the defendant's relation to the property is that of trustee, such enforcement of the lien would destroy the trust, and so defeat the very object of the

conveyance through which they derive title. The trust was for the habitation and use of the bishop of the diocese; it was accepted with notice that the improvements were necessary to fit the buildings for occupation, and had been begun under proper authority. It was the duty of the defendant to allow them to be finished, and it will be no violation of the conditions upon which the premises are held, to subject them to a charge for the cost of the repairs through which alone the purposes of the trust were accomplished. If the building should now be burned, it might with the same force be urged that the mechanic who might repair or reconstruct it could acquire no lien, because enforcing it might diminish or even absorb the property. A statutory lien would be no better than the plaintiff's lien in equity.

The usual course of enforcing an equitable lien is by a sale of the property to which it is attached, and we find nothing in this case to take it out of the general rule. The appellant's remaining point is a sweeping one relating to various items of evidence of the bishop's declarations, letters and acts in connection with the purchase and repairs of the house. Under the circumstances disclosed in the record, they were properly received, either as acts of agency, or part of the transaction.

We think the decision of the referee was warranted by the facts before him, and that the judgment appealed from should be affirmed.¹

All concur.

Judgment affirmed.

TEFFT v. MUNSON.

COURT OF APPEALS OF NEW YORK, 1875.

(57 N. Y. 97.)

This was an action to restrain defendants, loan commissioners for Washington County, from foreclosing a mortgage executed to them by Martin B. Perkins and wife.

On the 18th day of January, 1848, Gamaliel Perkins purchased of Cortland Howland certain lands in Washington County, which were conveyed to him by warranty deed recorded March 7, 1848.

¹ Compare *Bright v. Boyd*, 1 Story, 478 (1841), in which improvements made by a *bona fide* purchaser of land whose title proved defective were allowed as "a lien and charge on the estate."—*Per Story, J.* 2 Story, 608.

in the clerk's office in said county. Gamaliel Perkins, immediately after his purchase, let his son, Martin B. Perkins, into possession of the premises, who forged a deed of the land from his father to himself and placed it upon record in the clerk's office of said county, May 27, 1850. On the 1st day of October, 1850, Martin B. and his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of \$1000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc., and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought, and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C. The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant: he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed (*Work v. Welland*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 id. 533; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mer-*

secretu, 3 Barb. Ch. 528, 561; *Jackson v. Bull*, 1 John Cas. 81, 90; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 29 Maine, 1831. And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law, and in such case the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it, and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage. The case of *White v. Patten*, *supra*, is entirely analogous to this. In that case the plaintiff derived his title from a mortgage, made to him by one Thayer, containing covenants of seisin, warranty, etc., and recorded February 19, 1834. At the time of the execution of this mortgage the title was not in Thayer, but in one Perry, his father-in-law. Perry afterward, by deed recorded August 2, 1834, conveyed the land in fee simple to Thayer, who conveyed the land by mortgage to the defendant, recorded the same day. The counsel for the defendant used the same arguments in a great measure which have been urged upon our attention by the counsel for the plaintiff in this case, both as to the title and the registry of the mortgages, and yet the court held in a very able opinion that the plaintiff had the prior and better title.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

For affirmance, Earl, Gray and Johnson, CC.

For reversal, Lott, Ch. C., and Reynolds, C.¹

Judgment affirmed.

VANDIVEER v. STICKNEY.

SUPREME COURT OF ALABAMA, 1883.

(75 Ala. 225.)

Appeal from Montgomery Circuit Court.

Tried before Hon. James E. Cobb. This was a statutory real action in the nature of ejectment brought by William P. Vandiveer against Henry G. Stickney and Mary E. Stickney; was commenced on 17th May, 1880; and, as to that portion of the land actually in controversy, to which a disclaimer filed by the defendants did not apply, the cause was tried on issues joined on the pleas of not guilty and the statute of limitations of ten years, the trial resulting in a verdict and judgment for the defendants.

The evidence introduced on behalf of the plaintiff tended to show that "the property sued for was the property of R. B. Owens at his death; that the said Owens died intestate, in the year 1862, leaving as his only heirs-at-law his children, William, Edwin, and Emma Owens, and Mrs. Stickney, the defendant; that said Emma died in March, 1869, unmarried, and without children;" that on 16th June, 1870, said Edwin and William Owens executed to the plaintiff a mortgage on an undivided two-thirds interest in the land described in the complaint, to secure money then loaned to them by the plaintiff; and that said debt had not been fully paid.

The evidence introduced on behalf of Mrs. Stickney tended to show that her sister Emma, at the time of her death, was about sixteen years of age; that prior to her death she expressed a desire that Mrs. Stickney should have her interest in her father's estate, on account of her care of her and on account of the money she had spent for her; that within a few days after the death of the said Emma, Edwin and William Owens and Mrs. Stickney "met and discussed the matter between them, and it was agreed between them that Mrs. Stickney should have said Emma's interest in said property;" that this agreement was verbal; that from the time of

¹ The dissenting opinion of Reynolds, C., is omitted.

said agreement, Mrs. Stickney entered into the possession of said property" by herself, or her husband, as trustee, or tenants, claiming the entire property as her own in good faith, continuously, openly, notoriously and adversely;" that she has continued "in such possession of the same by herself, husband or tenants, and was in such adverse possession at the time of the execution of said mortgage to the plaintiff, she, at that time, and ever afterward, claiming the said property as her own, in good faith, openly, notoriously and adversely to her brothers and all the world;" that on 21st February, 1870, the said Edwin executed a deed, conveying to Mrs. Stickney his undivided interest in said property, which deed was duly recorded; that the said William "had conveyed to Mrs. Stickney his undivided one-fourth interest in his father's estate, of which he was possessed, before his sister Emma's death, and that the deed conveying said interest was duly executed, prior to the death of his sister, Emma, and upon a valuable consideration; that the only right to said William's one-twelfth interest in said real estate, acquired through his said sister, Emma, claimed by Mrs. Stickney, was under and through said verbal agreement, and the adverse possession thereof as aforesaid;" and that after said verbal agreement, neither the said William nor the said Edwin ever asserted any right, title, claim or interest in or to the share of the said Emma in said property.

Plaintiff then introduced evidence tending to show that Edwin and William Owens were in possession of said stables and stable lot (a part of the property in controversy) in the spring of 1870, and at the time of the execution of said mortgage; and there was also evidence introduced by defendants, tending to show that the said William and Edwin Owens, while in possession as aforesaid, at the time of the execution of said mortgage, were there as the tenants and employees of the defendants, Stickney and wife, and in no other capacity. The said plaintiff also testified that he had no knowledge of the claim or title of Mrs. Stickney to the interest of her said brother William in said Emma's one-fourth of said property described in said mortgage.

The foregoing was the substance of the evidence introduced on the trial bearing on the questions decided by the court. The plaintiff reserved numerous exceptions to charges given and refused, which the opinion does not render necessary to set out.

Those charges are here assigned as error.

SOMERVILLE, J. We discover no error in the rulings of the Circuit Court, as shown in the present record.

In *Collins v. Johnson*, 57 Ala. 304, it was decided that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse

holding as against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years. The fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. It is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. The essence of adverse possession is the *quo animo* or intention with which the possession is taken and held by a defendant. It is in the settled language of the books, the intention which "guides the entry, and fixes its character" (Angell on Lim., § 386; *Ewing v. Burnet*, 11 Peters [U. S.] 41). Even where the technical relation of landlord and tenant exists, and despite the settled rule that a tenant will not be permitted to dispute the title of his landlord, there is no principle of law or of public policy which forbids a tenant from holding adversely to the landlord, so as to acquire title of the demised premises under the operation of the statute of limitations. But in all such cases, the presumption in the first instance is, that the tenant's possession is permissive and in subordination to the title of the landlord, and there must be clear and positive proof of a disclaimer or renunciation of the superior title, brought home to the knowledge of the landlord with unquestionable certainty (Angell on Lim., § 444; 2 Brick. Dig., p. 200, §§ 101, 102).

The evidence tended to show that the defendants held adverse possession of the lands in suit for more than ten years prior to the commencement of the action. The undivided interest of Emma Owen, which on her death descended in part to her two brothers, William and Edwin, was released by parol to their other sister, Mrs. Stickney, who is one of the defendants. Her adverse possession commenced at this time, which was about the middle of March, 1869, and is shown to have continued, without any subsequent recognition of the title of her donors, until the commencement of this suit, in May, 1880. The mortgage executed by the two brothers to Vandiveer, the plaintiff, in June, 1870, did not change the adverse nature of Mrs. Stitekney's possession, nor operate in any manner to stop the running of the statute.

This mortgage, moreover, is shown to have been executed by the mortgagors during the period of Mrs. Stickney's occupancy and adverse holding, the hostile character of which was not only known to them, but, in its inception, was expressly authorized by their parol release of the deceased sister's interest in the mortgaged lands. The mortgage was therefore void as tending to promote champerty and maintenance by traffic in litigated titles. The

rule of law rendering conveyances of lands void, when held adversely, is, in part, one of public policy, designed to "throw obstacles in the way of asserting doubtful rights to the prejudice of occupants (*Clay v. Wyatt*, 6 J. J. Marsh, 583; *Bernstein v. Humes*, 69 Ala. 582). "It seems," says Chancellor Kent, "to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity as well as the intention to deliver possession" (4 Kent. 448).

To avoid a conveyance on this ground, it is not requisite that such adverse possession should be asserted under any color of title, but only under claim of right. But it must be actual as distinguished from constructive possession (*Bernstein v. Humes*, 71 Ala. 260; *Eureka Co. v. Edwards*, *ib.* 248). Nor is it required that the mortgagee, or other purchaser should have actual notice of such adverse holding, in order to vitiate the conveyance. The constructive notice implied from possession is sufficient (*Bernstein v. Humes*, *supra*). Nor, yet again, does a knowledge by one in actual possession, claiming title, that his title is defective, avail to destroy its adverse character. The test is the actual claim, and not the *bona fides* of it, in all cases, at least, where the possession is actual and not merely constructive (*Smith v. Roberts*, 62 Ala. 83; *Alexander v. Wheeler*, 69 Ala. 332; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232). These principles are all pertinent to the present case, and were recognized in the rulings of the court.

The doctrine settled in this State is, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. The reason is, as observed in a former decision, that an inquiry of the occupant will be likely to lead to a knowledge of the fact that he is a mere tenant, holding, not in his own right, but in the right of another who is his landlord (*Brunson v. Brooks*, 68 Ala. 248; *Pique v. Arendale*, 71 Ala. 91. *Wade on Notice*, §§ 284-286; *Burt v. Cassety*, 12 Ala. 734).

It was immaterial, therefore, that the mortgagors were in the temporary occupancy of a portion of the property sued for at the time of the execution of the mortgage, in the year 1870, provided they entered after the commencement of Mrs. Stickney's adverse possession, and as mere tenants, fully recognizing the superiority of her title as owner and landlord. Purchasers from tenants are as fully precluded as the tenants themselves from disputing the title of their landlord (*Taylor's Land & Ten.*, § 91; *Bishop v. Lafourette*, 67 Ala. 197). The principle settled in *McCarthy v. Nicusa*, 72 Ala. 332, does not conflict with this view. There the possession of the vendor and purchaser was joint, both being in actual possession at the time the deed was executed. It was held that, inasmuch as there was no visible change of possession, a third person

purchasing would not be charged with constructive notice of the unrecorded deed of the first vendee. If, however, the vendor had openly and visibly yielded exclusive possession to the vendee, and had afterwards gone in as a mere tenant, the rule would have been otherwise. Such is this case, in fact as well as in principle and legal effect.

Judgment affirmed.

NEW YORK REAL PROP. LAW, § 225. *Effect of Grant or Mortgage of Real Property Adversely Possessed.*—A grant of real property is absolutely void if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

CHAPTER II.

SECURITY.

SECTION I. MORTGAGE AND CONDITIONAL SALE.

ST. JOHN v. WAREHAM.

COURT OF CHANCERY, 1635.

(3 *Swanst.* 631.)

THE defendants, for 3000*l.*, conveyed the lands to Sir Richard Grobham and his heirs; Sir Richard made a lease to Wareham, rendering to him and his heirs 230*l.* per annum, and this lease was for seven years, with a *nomine poenæ* distress and clause of re-entry, and a proviso, that if Wareham and his heirs should within seven years be desirous to repurchase, and signify the same to Sir Richard Grobham, his heirs and assigns, and pay them 3000*l.*, then he and they to assure to Wareham. *Lord Coventry, Richardson*, Chief Justice, and *Crook*, decreed the money to the heir of Sir Richard G., and not to the plaintiff, Saint John, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 Car. 2., *Cage v. Sir Ralph Bory*; and again, T. 24 Car. 2., in *Isaac Cottington v. Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase money within seven years. But if the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage.—*Per* Lord Nottingham, L. Ch., in *Thornborough v. Baker*, 3 *Swanst.* 628.

MELLOR v. LEES.

COURT OF CHANCERY, 1742.

(2 *Atk.* 494.)

This case came before the Chancellor upon an appeal from the Rolls.

A mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead; the Whiteheads afterwards, on the 5th of June, 1689, mortgaged the same estate to Cartwright and John Heywood, and their heirs, for securing 200*l.* to which Thomas and his son John Mellor were parties; and Cartwright and Heywood, in order to secure to themselves the interest, made a lease to the plaintiff's father, John Mellor, dated the 12th of June, 1689, and to his assigns, for 5000 years, at the rent of twelve pounds a year, for the three first years, and ten pounds a year for the remainder of the term; and if in the space of three years the 200*l.* was paid, and the interest, then the premises were to be re-conveyed.

Receipts have been given since, sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730.

The 200*l.* lent, was money left under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee in Lancashire, or Cheshire, and the rents of it, when purchased, to be applied towards clothing 24 aged and needy house-keepers.

The plaintiff, the 20th of January, 1738, gave notice that he would pay in the money, but the defendant, a new trustee of the charity, refused to take it, and insisted upon it as an absolute purchase: and was so decreed by the Master of the Rolls, William Forster, Esquire.

The estate, at the time of the mortgage, was worth 500*l.* only, but would sell now for 900*l.*

LORD CHANCELLOR [HARDWICKE]. To be sure, the rules of this court relating to mortgages ought to be adhered to, that borrowers of money may not be oppressed.

There are two general questions in the present case.

First, As to the contract, Whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a re-purchase?

Secondly, If originally intended as a mortgage, Whether length of time will not be a bar to redeeming?

As to the *first*, There is a difference between such an agreement as this, which relates to a rent-charge issuing out of land, and an

agreement which relates to the land itself. So likewise the case of creating a rent-charge out of lands, and mortgaging a rent-charge, is of different considerations. Where a man takes a mortgage, it is not barely adequate to the payment of the interest, or even to a perpetual payment of the interest, but generally the estate is double the value of the principal money lent.

If, indeed, any fetters had been laid upon redeeming the mortgaged estate, by some original agreement, either in the mortgaged deed, or a separate deed, it would not avail, where it is done with a design to wrest the estate fraudulently out of the hands of the mortgagor. But where is the fraud, or the inconvenience, in the present case? The land itself is not parted with, but it is merely selling a rent-charge, strictly adequate to the consideration given, the 200*l.*, and instead of having a chance for the whole estate, the lender of the money is contented to buy the interest for ever, by way of rent-charge.

I have said thus much in general; and now I come to the particular circumstances in this case. From the agreement, and from the articles themselves in 1689, it appears plainly to be the intention of the parties that after the end of the three years the interest should be changed into a rent-charge, and be irredeemable. The objection is, that the court will not permit a clause in the same deed, or in another, which shall fetter the redemption; and the observation is very right, when applied to the case of a common mortgage.

But what has been said by the defendant's council with regard to the charity, is very material (not that I will lay down a general rule with regard to all charity money lent on mortgage), for here a sum of 200*l.* is left by one Sutton, which is not to be laid out at interest, but to be invested in land in fee-simple, so that the trustees of this charity, being under an inability of treating in the common way, have put it in this method, and it is the will itself that has laid a foundation for transacting it in this manner, and has deterred the defendants from the suggestion of oppression and imposition.

It is material in the present case that here is no covenant in the deed for the repayment of the mortgage money, which shows a plain intention of purchasing a rent-charge. In general, indeed, this is no rule against redemptions in common and ordinary cases, though there is no such covenant; but here it is explanatory of the whole scheme and intention of the parties. The agreement is to take a rent-charge, at the rate only of 5 per cent. which was extremely fair, considering the interest of money kept up long after at 6 per cent.

Floer v. Lavington, 1 P. Wms. 261, is the only case that comes

near the present.¹ *Bonham v. Newcomb*, 2 Vent. 364, went upon a different reason, and is an exception out of the general rule.

I do not singly found my opinion upon the nature of the contract in the principal case, but on the great length of time, for this bill is brought at the distance of 48 years.

And though it is very true, that the court will not suffer a common and plain mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a considerable time, because it would be making the mortgagee a bailiff to the mortgagor, and subject to an account; yet, in this case of a rent-charge, there would be no such inconvenience, for the person might easily account. But consider how much the value of money is altered since 1689, and likewise the value of the rent-charge. For if the purchaser was to reconvey his rent-charge now in 1742, he could not possibly purchase another with the 200*l.* that would produce more than 7*l.* a year; therefore if the person who had a right to redeem had come sooner, something more might have been said.

There is still another reason, that it would make property precarious; for if after the three years it became an absolute estate, then it is a freehold, and would be conveyed as such; if considered as a redeemable interest, then it is only personal estate; this would create great confusion, and render it very difficult for persons either to dispose of their property, or to settle what kind of conveyance is proper.

Therefore, this bill has been properly dismissed at the *Rolls*, not so much upon general rules as upon the particular circumstances of the case, and upon the likeness there is between this and the case of *Floyer v. Lavington*.

His Lordship affirmed the decree, but gave no costs of either side.²

¹ One for 800*l.* consideration grants a rent-charge of 48*l.* a year in fee, upon condition that if the grantor, during his life, shall give notice and pay in the 800*l.* by instalments—viz., 100*l.* at the end of every six months, and shall do this during his own lifetime, then the grant to be void. The mortgage was made about sixty years since, when the legal interest of money was eight per cent. Lord Chancellor Cowper was of opinion the rent-charge was not redeemable, and decreed the bill for a redemption should be dismissed.—*Floyer v. Lavington*, 1 P. Wms. 268.

² "This is a sale for an annuity absolutely, and not redeemable; but when they are redeemable, the court looks upon it as an evasion of the statute of usury and only a loan for money."—*Per* Lord Hardwicke, in *Floyer v. Sherard*, Ambler, 18.

"There is, indeed, a distinction in the nature of the transaction, between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the court leans extremely against contracts of this kind, where the liberty of repurchasing

CONWAY v. ALEXANDER.

SUPREME COURT OF THE UNITED STATES, 1812.

(7 *Cranch*, 218.)

This was an appeal from the Circuit Court for the District of Columbia, sitting in Chancery, at Alexandria.¹

MARSHALL, Ch. J., delivered the opinion of the Court as follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs, and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of £700 with interest from the said 20th day of March, 1788. And if the said Robert Alexander shall pay the said William Lyles on or before that day the said sum of £700 with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then

is made at the same time, concomitant with the grant, as it must be considered in this case: being part of the same transaction, the court going very unwillingly into that distinction, and endeavoring if possible to bring them to be cases of redemption. Although it is a different thing where the contract for liberty to repurchase is after a man has been some time in possession of an estate, and acting as owner under a purchase"—*Per Hardwicke, Ld. Ch., in Longuet v. Scawen*, 1 Ves. Sr. 402, 405 (1749).

¹ The statement of facts is omitted.

lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of £700; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th day of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of £700, convey the said land in fee to William Lyles. On the 23d of August, 1790, William Lyles, in consideration of £900, conveyed the said twenty acres of land and 140 acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of £700, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves

of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not in itself conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secured. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the £700 on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it at least possible that a division might be useless.

Having made these observations on the deed itself the Court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a pre-existing

debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource. To this circumstance the Court attaches much importance. Had there been any treaty, any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption: an intention which a Court of Chancery will invariably defeat. His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage he would naturally have

resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional implies an expectation to redeem. A conditional sale made in such a situation at a price bearing no proportion on the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at £5 per acre conditionally, which, in fact, were worth £15, or £20, or £50 per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for £5 per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the Court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.¹

Decree reversed.

COYLE v. DAVIS, 116 U. S. 108 (1885). "The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral paper—the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland v. Blake*, 97 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of

¹ *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138 (1833); *Rich v. Doane*, 35 Vt. 125 (1862); *Cornell v. Hall*, 22 Mich. 377 (1871); *Hanford v. Blossing*, 80 Ill. 188 (1875); *Randall v. Sanders*, 87 N. Y. 578 (1882).

Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration where there is a considerable disproportion between the price paid and the real value of the property (*Russell v. Southard*, 12 How. 139, 148). There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*, and Coyle's interest was a minority interest. These considerations made it difficult of sale at all."—*Per* Blatchford, J.

RUSSELL v. SOUTHARD.

SUPREME COURT OF THE UNITED STATES, 1851.

(12 How. 139.)

This was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

It was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the court. Upon the trial the Circuit Court dismissed the bill, and Russell appealed to this court.

It was argued by *Mr. Underwood* and *Mr. Morehead*, with whom was *Mr. Clay*, for the appellant, and by *Mr. Nicholas* for the appellee.

MR. JUSTICE CURTIS delivered the opinion of the court.¹

This is a suit in equity to redeem a mortgage, brought here by appeal from the Circuit Court of the United States for the District of Kentucky.

On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee-simple, to James Southard, deceased, whose brother and devisee, Daniel R. Southard, is the

¹ Portions of the opinion, dealing with foreign questions, have been omitted.

principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the city of Louisville. At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows :

“ Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell’s farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of \$4929.81½ cents, which has been paid and fully discharged by the said Southard as follows, viz., first two thousand dollars, money of the United States, paid in hand ; secondly, the transfer of a certain claim in suit in the Jefferson Circuit Court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of \$1558.87½ ; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of \$1270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, &c., and James C. Johnston, &c., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can. The said James Southard agrees to resell and convey to the said Russell the said farm and two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] 81½ cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, &c., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void ; and the wife of said Russell shall relinquish her dower within a reasonable time as per agreement of this date. This agreement of resale by the said James Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of \$4929.81½ ; and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only upon the said James Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

“ In witness whereof the parties aforesaid, have hereunto set their

hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

"GILBERT C. RUSSELL, [SEAL.]

"JAMES SOUTHARD, [SEAL.]

"Witness present, signed in duplicate—

J. C. JOHNSTON."

The first question is whether this transaction was a mortgage, or a sale. . . .

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed?

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold (*Conway v. Alexander*, 7 Cranch, 241; *Morris v. Nixon*, 1 How. 126; *Vernon v. Bethell*, 2 Eden, 110; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Edrington v. Harper*, 3 J. J. Marsh. 354).

Upon this important fact the evidence leaves the court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal highways leading to that city. A dwelling-house, estimated to have cost from \$10,000 to \$12,000, was on the land.

In May, 1826, about 16 months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of \$12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Russell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was \$2000 in cash, and the assignment of two claims then in suit, amounting, with the interest

computed thereon, to \$2829.81. not finally reduced to money by Russell, till October, 1830, upward of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our investigations, the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about \$2000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies,—“Russell was anxious to sell; indeed he was importunate that I should purchase.” And a letter is produced by the defendant, D. R. Southard, written to James Southard, by Wing, containing a proposal for a sale. The letter is as follows:

“Sunday, Noon.

“SIR: Having had some conversation in relation to Colonel Russell’s plantation, I will take the liberty of submitting for your consideration, 1st, how much will you give for the place, crops, stock, utensils, and implements, or how much without the same, to be paid as follows: in one sixth cash in hand, the balance in one, two, three, four, and five equal annual instalments, which may be extinguished at any time with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation.

“Respectfully yours, J. W. WING.

“MR. SOUTHARD.

“N. B.—Please leave an answer for me at Allan’s, say this evening. Yours, &c., J. W. W.”

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell's necessity to have \$2000 in cash, the offer to take one-sixth cash, and the balance in one, two, three, four, and five annual instalments, indicates that Russell then expected about \$12,000 for the property, and had that sum in view as the price, when these terms were proposed. This offer to sell differs so widely from the terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell, about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, \$13,000 or \$14,000, and that he should consider it a sacrifice at \$10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between \$4000 and \$5000 on the place, but that, in case he owned the place, it would cost him \$10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that "James Southard and Gilbert C. Russell, I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of

an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defence a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale (*Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 2 Sumner, 533; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bonnell*, 1 Green, Ch. R. 264; *Robertson v. Campbell*, 2 Call, 421; *Poindexter v. McCannon*, 1 Dev. Eq. Cas. 373).

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage (*Floyer v. Lavington*, 1 P. Wms. 268; *Lawley v. Hooper*, 3 Atk. 278; *Scott v. Fields*, 7 Watts, 360; *Flagg v. Mann*, 2 Sumner, 533; *Ancaster v. Mayer*, 1 Bro. C. C. 454). And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it

was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey*, 1 Sandf. Ch. R. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor (*Ancaster v. Mayer*, 1 Bro. C. C. 464; 2 Greenl. Cruise, 82 n, 3). But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled, that an action of assumpsit will lie (*Tilson v. Warwick Gas-Light Co.*, 4 B. & C. 968; *Vates v. Aston*, 4 Ad. & El. N. S. 182; *Burnett v. Lynch*, 5 B. & C. 589; *Elder v. Rouse*, 15 Wend. 218). . . .

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage. . . .

A decree is to be entered, reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that Russell is entitled to redeem the same, and remanding the cause to the Circuit Court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.¹

¹ *Miller v. Thomas*, 14 Ill. 428 (1853); *Bearse v. Ford*, 108 Ill. 16 (1883); *Vos v. Eller*, 109 Ind. 260 (1886).

MATTHEWS v. SHEEHAN.

COURT OF APPEALS OF NEW YORK, 1877.

(69 N. Y. 585.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought by plaintiff, as administratrix with the will annexed, of Dennis O'Keefe, deceased, to recover moneys alleged to have been collected by defendant upon a policy of insurance issued upon the life of said O'Keefe, and assigned by him to defendant as security for advances made by the latter.

The facts appear sufficiently in the opinion.

N. C. Moak for the appellant.

Esek Cowen for the respondent.

EARL, J. In December, 1869, an arrangement was made between the plaintiff's testator, O'Keefe, and the defendant, whereby O'Keefe was to procure a policy of insurance on his life from the Phoenix Life Insurance Company, and assign it to the defendant, who was to pay the premiums and have the benefit of the policy, with the understanding that if at any time O'Keefe desired to redeem the policy, he could do so by paying the premiums advanced by defendant, with the interest thereon. In pursuance of this arrangement, O'Keefe procured the company to issue a policy on his life, which was immediately assigned to the defendant by an assignment absolute in form, and he paid all the premiums to the time of O'Keefe's death in 1874. Before that time O'Keefe, for the purpose of redeeming the policy, offered to pay the defendant the amount advanced by him for the premiums, and defendant refused to take the money. After the death of O'Keefe, the defendant received from the insurance company the amount insured, and retained the same, refusing, upon plaintiff's demand, to pay any portion thereof to her. This action was brought to recover the sum received by the defendant, less the amount for which he held the policy as security. Upon the trial, the facts above stated appearing, and there being no conflicting evidence, the court directed a verdict for the plaintiff.

The verdict was properly directed. Upon the undisputed evidence, O'Keefe had the option to treat the policy as a security for the premiums paid by the defendant, and to redeem the same. While O'Keefe was not bound to redeem, or personally liable for the money advanced by the defendant, there was sufficient consid-

operation for the arrangement made. O'Keeffe submitted to examination, procured his life to be insured, and assigned the policy to the defendant in consideration that the defendant would pay the premiums and give him the option to redeem. The substance and legal effect of the transaction was to make the defendant a mortgagee of the policy to secure him for the premiums paid, and he could not claim an absolute title thereto, except upon O'Keeffe's failure to exercise his option to redeem. This was not simply an agreement by the defendant to sell to O'Keeffe, upon payment by him of the amount of the premiums advanced with interest, a policy absolutely belonging to the defendant, an agreement void under the statute of frauds, because there was no writing or part payment. It was an agreement that the defendant might take and hold the policy as security and the right to redeem attended the policy into the defendant's hands, and at all times affected his title. Such an agreement may be shown by parol, although the assignment be absolute in form (*Hodges v. The T. M. and Fire Ins. Co.*, 8 N. Y. 416; *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605; *Hope v. Balen*, 58 N. Y. 380).

It matters not that O'Keeffe did not absolutely promise to pay the amount which defendant should advance for the premiums. To constitute a valid mortgage it is not essential that the mortgagee should have any other remedy but that upon his mortgage. This is recognized by the Revised Statutes in references to real estate mortgages (1 R. S. 739), which provide that when there shall be no express covenant in the mortgage for the payment of the money received, and no bond or other separate instrument to secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. In all cases the remedy of the mortgagee may by the agreement of the parties be confined to the mortgage.

It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. No general rule upon the subject can be laid down which will govern all cases, although it is said that the fact that there was no debt which could be personally enforced is a strong, but not an absolutely controlling circumstance, that the transaction was not a mortgage, but a sale and a conditional resale. *In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale*, because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has the right of redemption; while in the case of a conditional sale, with

out strict compliance, the rights of the conditional purchaser are forfeited (*Longuet v. Scawen*, 1 Ves. Sen. 402; *Glover v. Payn*, 19 Wend. 578; *Conway's Exrs. v. Alexander*, 7 Cranch, 218; *Edrington v. Harper*, 3 J. J. Marshall, 354; *Floyer v. Lavington*, 1 P. Wms. 268; *Chapman's Admin'x v. Turner*, 1 Colls. R. 280; *Wharf v. Howell*, 5 Binney, 499). In *Floyer v. Lavington*, it is said: "As to the objection that there was no covenant for the payment of the principal or interest, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz.: for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance, as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage." In *Brown v. Dewey*, 1 Sandf. Ch. R. 56, it was held that "the absence of the personal liability of the grantor to repay the money is not a conclusive test in deciding whether the conveyance is absolute or is intended as a security." In *Holmes v. Grant*, 8 Paige, 243, 257, Denio, V. C., says: "It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt *quoad* the redemption, but not in respect to the personal remedy." In *Flagg v. Mann*, 14 Pick. 467, Putnam, J., says: "There was no collateral undertaking on the part of Luther (the grantor) to pay the money which Walker and Fisher (grantees) should advance in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage, or a sale with a contract for a repurchase upon strict terms. (See also *Rice v. Rice*, 4 Pick. 349.) In *Kerr v. Gilmore*, 6 Watts, 405, Kennedy, J., says: "The want of a personal security for the repayment of the money has, taken in connection with other circumstances, been regarded as tending to show that a defeasible purchase and not a mortgage was intended, but this circumstance alone has never been held sufficient to prevent a redemption." Again, "that the mortgagee should have a remedy against the person of the mortgagor also, in order to make the conveyance a mortgage, is more than I can assent to." . . . In *Horn v. Keteltas*, *supra*, Allen, J. says that the circumstance that there was no agreement to pay the money secured is one entitled to considerable weight in determining whether a conveyance was intended as a mortgage, but that it is only one of the circumstances to be considered, and not conclusive; and Ch. J. Marshall, in *Conway's Exrs. v. Alexander*, 7 Cranch, 218, says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

It is clear, therefore, both upon principle and authority, that the circumstance that O'Keefe was not personally obligated to pay to the defendant the amount of the premiums which he should advance is not absolutely controlling upon the question, whether there was a mortgage, or a sale and a conditional resale. It is an important circumstance in such cases and, in the conflict of evidence, not unfrequently a controlling one. There are many cases, some of which are cited by the learned counsel for the appellant, in which it has been held to be not as matter of law conclusive, but as matter of fact decisive. If we should hold this to be a case of conditional resale, and that the consequence follows which has been so learnedly argued on behalf of the defendant, that the agreement is void under the statute of frauds, the intention of the parties would be defeated. This is, therefore, a case where the court should lean to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a repurchase or a resale, or a reassignment, but the right to redeem was expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a mortgage or a pledge, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other. The judgment must therefore be affirmed.

All concur.

Judgment affirmed.

FLAGG v. MANN, 2 Summ. 41. (1837). On the 14th of May, 1825, Luther Richardson conveyed certain premises in Lowell, which were then subject to incumbrances in favor of Joshua Bennett and others, to his brother Prentiss Richardson by a deed of quitclaim and upon a secret parol trust for the benefit of Luther. On the 6th of May, 1826, Luther Richardson and his wife and Prentiss Richardson executed a deed of quitclaim of the premises to Walker and Fisher, for the consideration of \$2000 (as stated in the deed), and on the same day Walker and Fisher executed a bond for \$10,000 to Luther Richardson alone, which provides that the obligees shall reconvey the premises to Luther Richardson whenever, within five years from date, he shall repay them such sums of money as they shall expend in discharging incumbrances and making improvements on the land. At the same time Walker and

Fisher executed to Luther Richardson a lease of a part of the premises for five years upon the annual rent of one cent during the term, unless the premises should be previously redeemed according to the provisions of the bond. A few days after this transaction, Walker and Fisher took from Bennett a quitclaim deed of all his right in the premises, and shortly thereafter they took assignments of several mortgages to which the property was subject, and thus became the exclusive owners of the premises, subject only to the right of redemption of Luther Richardson under their bond to him, above referred to.

The question was whether the conveyance by the Richardsons to Walker and Fisher, connected with the other papers and circumstances, amounted to a mortgage or to a conditional sale of the premises.¹

STORY, J. (531.) Did, then, the transaction between the Richardsons and Walker and Fisher create a mortgage in the premises? Some things are, to my mind, exceedingly clear. In the first place, the deed to Walker and Fisher, and the bond by them to Luther Richardson, are to be treated as part of one and the same transaction. They were, in my judgment, executed at the same time; and if not, at all events they were intended to be contemporaneous in their object and operation. Neither was to be of any force or validity without the other. The bond must have the same precise effect and construction, as if it were inserted in the body of the deed. If, by being so inserted, a mortgage could be created, it was equally created by its being in a separate instrument. In the next place, no consideration whatsoever was paid by Walker and Fisher to Luther or Prentiss Richardson, on account of the deed, at the time of the execution of it, or has been at any time since. It is true, that there is the consideration of the thousand dollars stated in the deed; but it was purely nominal. No person pretends that that sum or any other sum was in fact paid, or intended to be paid. If this were the whole case, the deed would be merely voluntary; and the question of a conditional purchase could never arise; for to constitute a conditional purchase, there must be a sale for valuable consideration between the parties, with a right of repurchase. A mere gift would not raise the question; and, indeed, there is no pretence in the present case to say that any gift was intended.

What, then, was the real consideration between the parties? To me it appears plain, that there was an agreement by Walker and Fisher, at the request and for the benefit of Luther Richardson, to pay off forthwith the incumbrance of Bennett on the premises, and thereby to save the equity of redemption from being totally extin-

¹ The facts here stated are extracted from the elaborate report of the case, pp. 486-493.

guished. On the part of Richardson, there was an agreement to convey the premises to Walker and Fisher, to secure the payment of this advance and all other advances made by them toward the extinguishment of the antecedent mortgages and all expenditures in improvements, with a right reserved to Richardson of reconveyance upon his repayment thereof within five years. This was the basis of the papers actually executed; and the whole transaction would otherwise be without any just aim or object. Bennett's title to the premises would become in a few days absolute, unless he was redeemed. Richardson was, notoriously, unable to redeem from his own funds, and that inability constituted the ground of the application to Walker and Fisher. It would have been the idlest of forms, and the most useless of contrivances, to shift the title from Prentiss Richardson to Walker and Fisher, if it was the design of all parties that it should perish in the space of twelve days, without any attempt of redemption. The very nature of the transaction demonstrates to my mind, that the redemption of Bennett by Walker and Fisher was the *sine quâ non* of the whole arrangement. If there could be the slightest doubt upon this head from reading the testimony of Walker and Fisher, it would be entirely removed by the other evidence and by admitted facts. Bemis says that about the time the papers were finishing, Bennett passed in the street, and was called in; and Walker and Fisher requested Bemis to ask Bennett to appoint a time when they should meet him at Billerica and pay him the money. He did so and Bennett appointed the time. And on the day so appointed, Walker and Fisher and Richardson and Bemis met at Billerica, and the money was paid by Walker and Fisher, and the deed was accordingly executed to them by Bennett. This is as pregnant and conclusive a proof of the real nature of the transaction as can be desired.

Upon this posture of the case, what ground is there to say that there was a conditional sale of the premises to Walker and Fisher? They paid nothing to Luther Richardson for any transfer of his right to them. They simply paid, at his request, a subsisting debt due from him to Bennett, and took a transfer from Bennett of his interest in the premises. Beyond this they paid nothing; and upon the reimbursement of this and all other advances on account of the premises, within five years, the premises were to be restored to Richardson. It was in truth but the transfer of a debt from one creditor to another, with the assent of the debtor, expanding the equity to redeem the estate pledged for it from a few days to five years.

It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of any money or not. I agree to that; and

indeed, in all cases the true test, whether a mortgage or not, is to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase.

It is said that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett and to take the premises as their security for reimbursement within five years.

It is said that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important to ascertain whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*. The doctrine is entirely well settled; and for this purpose it is sufficient to refer to *Floyer v. Lavington*, 1 P. Will. R. 270, 271; *King v. King*, 3 P. Will. R. 360; *Longuet v. Scawen*, 1 Ves. R. 406; *Mellor v. Lees*, 2 Atk. R. 496; *Goodman v. Grierson*, 2 Ball & Beat. R. 278, and *Conway's Ex'rs v. Alexander*, 7 Cranch R. 237, out of many cases. Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A., at the request of B., pays a debt due by him to C., A. may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar.

If it should be asked why no personal obligation was given by Richardson on this occasion to pay the money, it might be answered that the whole circumstances of the present case show an extreme looseness in the transaction of business between the parties; and considering that much of it was done by the advice and with the assistance of counsel, it is not very creditable to the skill and diligence of the profession. The negotiations between Flagg and Mann and Richardson evince a most obstinate carelessness in the draft and execution of important instruments, leaving much to personal confidence and the imperfect recollections of the parties, as

well as that of the witnesses. And there is no ground for surprise in finding the same laxity pervade the arrangements of Richardson with Walker and Fisher. But the satisfactory answer is that Richardson was poor and embarrassed, and Walker and Fisher relied on the premises for a full indemnity and satisfaction of all their advances, believing that Richardson would never be able to redeem. They were indifferent about the personal obligation, as they possessed an adequate fund in their own hands.

It is well known that Courts of Equity lean against construing contracts of this sort to be conditional sales; and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage. So Lord Hardwicke laid down the doctrine in *Longuet v. Scaven*, 1 Ves. R. 406, and it has never been departed from. The *onus probandi*, then, is on the defendants to establish it to be a conditional sale. If it be doubtful, then it must be construed to be a mortgage.

If we look to the condition of the bond, it is difficult to resist the impression that it is precisely in its terms such as would be appropriate if the conveyance were a mere mortgage to secure future advances to be made by Walker and Fisher in discharge of the incumbrances referred to in the recital. The language of the accompanying lease points to the same conclusion. The dwelling house and garden (a valuable part of the premises) were let to Richardson for five years at a nominal rent; a proceeding not easily reconcilable with the notion of a positive purchase, but quite reconcilable with the notion of a mortgage. That lease contains some language not without significance on this subject. The lease is "for the term of five years from this date, yielding and paying therefor the sum of one cent annually, unless the said premises shall be redeemed by the said Luther, agreeably to the provisions of a bond bearing even date herewith from Walker and Fisher to said Luther." I do not lay great stress upon the word, "redeem," in this lease, as conclusive in regard to the understanding of the parties, though it is a word peculiarly appropriate to the case of a mortgage; for it is sometimes used as equivalent to "reconvey." But, certainly, it is not without weight in a case of this nature; and it was relied on by Lord Hardwicke in *Lawley v. Hooper*, 3 Atk. R. 278, as indicative of a mortgage. But the fact that Walker and Fisher were not to go into possession of the entire premises, but that Richardson was to retain the possession of a valuable portion for five years, without payment of any rent, is certainly important. It is remarked by Mr. Butler, in his learned note to Co. Lit. 204, b, that the circumstance that the grantee was not to be let into immediate possession of the estate, affords a presumption of its being a mortgage.

It is not unimportant, also, that, in the very assignment made

of the bond by Richardson to Flagg and Mann, the conveyance to Walker and Fisher is expressly described as a mortgage. And supposing that assignment to be a valid and subsisting instrument, it is not easy to see how Mann can now be permitted to set up that conveyance as an absolute estate to defeat the rights of his co-assignee, he having purchased in the title for his sole account.

But what strikes me as most material in this case is the allegation by both Walker and Fisher in their testimony that notwithstanding the conveyance to them, they did not contract, and were not bound, to pay off any of the incumbrances. If this were true, there would be an end of treating it, as has been already suggested, as a conditional purchase. I have endeavored to show that they were positively bound to pay off Bennett's incumbrance. In regard to the antecedent mortgages, they positively deny that they engaged to pay them off. Now, if this be true, it would be impossible to consider this as a conditional purchase without the grossest injustice. The purchase would be for little less than a tenth of the value of the property; for Richardson would still be personally bound for the payment of those mortgages. Nay, he would be bound to pay to Walker and Fisher, as the assignees of those mortgages, and now to Mann, as their assignee, the full amount due on those mortgages, notwithstanding the extinguishment of his title in the premises, by the lapse of the five years. Those mortgages, in their view of the matter, are still subsisting mortgages, capable of being enforced at law, and were not to be extinguished by the purchase and assignment to themselves. So that, if this be admitted to be the true interpretation of the whole arrangement, Walker and Fisher obtain property, confessedly worth, in their own opinion, more than \$10,000, by the payment, at most, of the sum of \$1200 only, to Bennett. I have not heard any such doctrine contended for at the argument, although it seems to me a natural consequence from the positions assumed. If the mortgages were not agreed to be extinguished by Walker and Fisher when they took the conveyance, nothing has since been done by the parties to extinguish them. On the other hand, if that transaction was a mortgage, the whole proceedings are, in legal operation, exactly what they should be. The debt to Bennett and the mortgages constitute a subsisting lien on the premises; and they must be paid by Richardson, before he can claim a reconveyance. Now, it has been well remarked by Mr. Butler, in the note above cited (*Co. Litt.* 201, *b*, note 1), that if the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him, it affords a strong presumption that the conveyance was a mere mortgage. The same suggestion was pointedly made in *Conway's Ex'rs v. Alexander* (7 Cranch, R. 241).

On the contrary, if, in opposition to the positive testimony of Walker and Fisher, we are to deem it a part of the agreement at the time of the conveyance to them that they should pay off the mortgages, having their security for their advances upon the premises, then the same considerations apply to this as to the payment to Bennett. The payments so made were for debts of Richardson, and paid at his request.

I observe that the assignments of these mortgages to Walker and Fisher speak of the debts as subsisting debts, and the mortgages as liable to be redeemed by Richardson; and Walker and Fisher are authorized to receive the sums due thereon for their own use.

But it is said, that it was distinctly understood, that the conveyance should not be a common mortgage; and that the premises should be irredeemable after the five years; and that the shape which the negotiation took was for the very purpose of accomplishing this object. Be it so; still if in fact the conveyance was a mere security for advances to be made to Richardson, and the premises were redeemable upon payment of these advances within the five years, in contemplation of law it was a mortgage, whatever name the parties might choose to give to it. Nothing is better settled than the doctrine, that where the conveyance is a mere security, it is a mortgage; and that if it be a mortgage, the parties cannot—by their agreement that there shall be no equity of redemption after a limited time—change the rights of the mortgagor. The common maxim is, *once a mortgage, always a mortgage*. The right to redeem is a necessary incident, and cannot be extinguished by a mere covenant that it shall not be claimed after a limited period. It seems to me that the shape of the transaction was merely to evade the principles of law applicable to mortgages. Walker and Fisher were willing to make advances to pay Richardson's debts, and to reinstate him in his equity of redemption. They were willing to give him five years to repay the advances and redeem the estate. But they meant, after that lapse of time, to hold the estate, if unredeemed, by an absolute title. This appears to be the manner in which Bemis understood the transaction; and the only mistake in the matter has been a mistake of law. Luther Richardson's own testimony points still more distinctly to the transaction as being a mortgage in contemplation of law, whatever might have been the understanding of the parties as to its redeemable quality. The negotiation, according to his statement, began in asking a loan and ended in an agreement to pay off all the incumbrances, taking the conveyance for the repayment within five years.

There is an intrinsic difficulty in treating this transaction as a conditional sale, in whatever manner the circumstances are viewed. It seems to be of the very essence of a sale, that there should be a

fixed price for the purchase. The language of the civil law on this subject is the language of common sense. *Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest*, say the Institutes (lib. 3, tit. 24). Ulpian, in the Digest, repeats the same suggestion; *Sine pretio nulla venditio est* (lib. 18, tit. 1, c. 2). Now, here is not the slightest proof, in this case, of any sum being agreed on as the price of the purchase. No money was in fact paid; and if Walker and Fisher are to be relied on, none was contracted to be paid; and even the incumbrances were not to be discharged. The money which was to be repaid on the reconveyance, was only what had been, in the intermediate time, actually paid to discharge the incumbrances and expended in improvements. If none had been so paid, none was to be repaid. So that not only was there no fixed price; but the premises stood as a mere security for future advances.

Hitherto the case has been considered, upon the question of mortgage or not, upon the footing not merely of the conveyance and bond, but of the parol evidence admitted as explanatory of the intent of the parties. It has been suggested, however, on behalf of the plaintiff, that as the papers, upon their face, taken together, do actually import a mortgage, it is not competent to admit parol evidence to control their legal effect. There is weight in the objection; for, in my judgment, the papers, taken together, do distinctly proclaim the case to be a present mortgage for future advances. But it is unnecessary to consider this objection, as the same conclusion is arrived at upon a full survey of all the parol evidence and circumstances attendant upon the transaction.

CHAPTER II. (*Continued*).

SECTION II. ABSOLUTE DEED—PAROL EVIDENCE.

COTTERELL v. PURCHASE.

COURT OF CHANCERY, 1734.

(*Cas. temp. Talb.* 61.)

The plaintiff and her sister being seised of an estate in Yorkshire as jointenants, the plaintiff by lease and release, in consideration of 104*l.* conveys the moiety to the defendant and his heirs; but it was admitted, that the conveyance (though absolute in law) was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Sometime after, in the year 1708, those deeds were cancelled; and in consideration of a farther sum, which made up the whole 184*l.* she conveys the estate in manner as before, but with this farther covenant, That she would not agree to any division or partition of the estate, or make, or cause to be made, any division or partition thereof, without the licence, consent, advice and appointment of him the said Benjamin Purchase. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710, when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed it quietly till 1726, at which time the plaintiff filed her bill to [be] let into redemption; to which the defendant pleaded himself an absolute purchaser for a valuable consideration; and in 1732, the cause coming to be heard upon the merits, the *Master of the Rolls* was of opinion, that the deeds of 1708, amounted to an absolute conveyance; and dismissed the bill.

For the defendant were given in evidence several particulars to shew that by the deeds of 1708, the parties intended an absolute conveyance of this estate. And it was insisted that as the deeds were an absolute conveyance in law, by the statute of frauds no trust or mortgage could be implied without an agreement in writing. And they insisted likewise, that as the defendant had been in possession ever since the year 1710, the plaintiff was barred of the redemption by the statute of limitations.

It was said on the other hand for the plaintiff, That the de-

defendant's plea admitted the first conveyance made in consideration of the 104*l.* to be intended but as a mortgage; and that the second conveyance was in the same form, excepting the covenant; and that it was therefore probably intended in the same manner. That as to the covenant, it made strongly for the plaintiff; since to suppose a person would absolutely sell away his estate, and then covenant not to make a division of it, is absurd. That the statute of frauds makes nothing against the plaintiff; this being in nature of a resulting trust, and so within the proviso in that statute. Nor can the statute of limitations affect the plaintiff; since in cases of redemptions the court always gives what it thinks a reasonable time. And though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances; yet that rule cannot affect the plaintiff, who did not lose possession till 1710. and brought her bill in 1726.

LORD CHANCELLOR [TALBOT]. The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case: for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance; so that it is of no great weight, and must be laid out of the question. Then as to the circumstances; on one side has been shewed an account stated of money received; and it is there said *so much received on account of purchase money*, and in another general account the sum of 184*l.* is called *purchase money*. Then as to the agreement in 1710. that if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest, and the costs he had been at: this shews it was not redeemable at first. There have been strong proofs on both sides as to the value: one has shewn the rent to be but 27*l. per ann.* and then deducting one third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be 40*l. per ann.* But I rather give credit to the first; because it is certain the dower was but 9*l. per ann.* So that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified: for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud; and no length of time will

bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant; yet it is not like making an entry and then lying still; for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it; but I think it a wrong way; and, to me, it will always appear with a face of fraud: for, the defeazance may be lost; and then an absolute conveyance is set up. I would discourage the practice as much as possible.¹

Upon the circumstances of the case, affirmed the decree, &c.

KELLERAN v. BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1808.

(1 *Mass.* 443.)

This was a writ of entry, and upon the general issue pleaded was tried before Thatcher, J., September term, 1806, when a verdict was rendered for the demandant.

In support of the action, the demandant read in evidence a deed of Timothy Manly conveying the land demanded to the demandant in fee.

The tenant, in defence of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises as his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz.: "Thomaston, May 26, 1800. I, Edward Kelleran, the subscriber, having purchased of Timothy Manly a lot of land lying in said Thomaston, containing fifty acres (being the lot which the said Manly purchased of Ebenezer

¹ "So where an absolute conveyance is made for such a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money and has it paid him, this will be admitted to explain the nature of the conveyance"—*Per* Lord C. Nottingham, in *Marvell v. Lady Mountacute*, Finch, Pre. Ch. 526 (1719).

"Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeazance, will not this court relieve against such fraud?"—*Per* Lord Ch. Hardwicke, in *Walker v. Walker*, 2 Atk. 98 (1740).

Bly) for which I have received a warranty deed; but if the said Manly shall repay me the the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. Edward Kelleran;" and also offered to prove to the jury that the tenant, Brown, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence, as inadmissible. To which opinion of the judge the counsel for the tenant excepted, as erroneous; whereupon the cause stood continued for the opinion of the Court upon the said exceptions.

At last June term in this county, the cause was briefly spoken to by *Mellen* in support of the exceptions, and thence continued for advisement, and now the opinion of the Court was delivered by

PARSONS, C. J. The demandant has sued a writ of entry, to recover his seisin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is the tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kelleran in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand, of the following tenor: (Here his honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was, therefore, estopped from proving that he had not the freehold but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeasance at common law of the conveyance made by Manly to the demandant, the tenant might have read it in evidence to show that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged, and if we had all the equity powers of a Court of Chancery, I should be satisfied that the conveyance in this case, with the written contract of defeasance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

But the equity powers of this Court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeasance. (*Vide* Statutes 1785, c. 22;¹ 1798, c. 77.) Now a defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as part of it; so that the conveyance and defeasance must be taken together and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed. In this case the conveyance by Manly to Kelleran was by deed, and the agreement by Kelleran was merely by a simple contract; and, however it might in equity have the effect of a defeasance, at law it is not a defeasance of the deed of Kelleran.

The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. The written contract to Kelleran not under his seal was, in our opinion, properly rejected as evidence.

Judgment according to the verdict.

STRONG v. STEWART.

COURT OF CHANCERY OF NEW YORK, 1819.

(4 *Johns. Ch.* 167.)

Bill to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of Mitchell in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed he gave Mitchell, at his request, time to return the money, and take back the assignment.

Parol proof was taken, which established conclusively the fact

¹ *An Act giving Remedies in Equity*, Perpetual Laws of Mass., p. 138. Compare Mass. Stat. 1855, c. 194, § 1; Gen. Stats., c. 113, § 2, and see page 196, *post*.

of a loan, and not a purchase and sale; and that the assignment was made, given and received, by way of security for a loan.

THE CHANCELLOR [KENT]. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem. The cases of *Cotterell v. Purchase*, Cases temp. Talbot, 61; *Maxwell v. Mountacute*, Prec. in Chancery, 526; *Washburn v. Merrills*, 1 Day's Cases in Error, 139, and the acknowledged doctrine, in 2 Atk. 99, 258, 3 Atk. 389, and 1 Powell on Mortg. 104 (4th London edit.) are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment.¹

Decree accordingly.

TOWN OF READING v. WESTON.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1830.

(8 Conn. 117.)

This was an action of assumpsit for the support of the wife and minor children of Samuel Darling.

The cause was tried (after two former trials),² at Fairfield, December term, 1829, before Williams, J.

The paupers derived their settlement from Lucy Darling, the mother of Samuel Darling. She was once an inhabitant of the town of Weston. The defendants claimed, that in March, 1808, she became the owner of a piece of land in the town of Reading, of the value of 800 dollars, by virtue of a deed from one Joseph

¹ "Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be made by admitting a verbal defeasance to be proved."—*Per Peters, J.*, in *Stinchfield v. Milliken*, 71 Me. 567 (1880).

² See 7 Conn. Rep. 143, 409.—*Rep.*

Burr. This deed was, on the face of it, an absolute deed, in the usual form, containing the usual covenants. A writing (recited at length, 7 Conn. Rep. 144) was made and signed by her, and delivered to Burr, simultaneously with the delivery of the deed, binding herself, if Burr should within three years bring her the 800 dollars, with interest, to deliver up to him such deed, but if he should fail to bring the money by the time limited, he should forfeit all claim to such deed. The defendants claimed that immediately after the execution of the deed, Lucy Darling, the grantee, went into possession of the land thereby conveyed, and possessed it in her own right in fee until the year 1813. It was admitted that she occupied part of the house and garden, belonging to the premises; and that Burr occupied the remaining part, during the period specified. Evidence was introduced as to the character of their respective possessions, or the right in which they occupied the premises; the plaintiffs claiming that Lucy Darling occupied as mortgagee under Burr and not in her own right. In support of this claim the plaintiffs introduced proof of her declaration that she had only a mortgage of the premises, and other parol evidence to shew that the deed and writing were given only to secure a sum of money, which Burr at that time borrowed of her, and for which he gave her his notes. This evidence was objected to by the defendants, but was received subject to the opinion of the court. And the court charged the jury that such evidence was proper to shew the nature, character and extent of her occupation; but that in this suit parol evidence could not be admitted to alter, enlarge or explain the deed or condition, or to shew that this conveyance was a mortgage.

The jury returned a verdict for the defendants; and the plaintiffs moved for a new trial, for a misdirection.

HOSMER, Ch. J. The only question in the case is, whether the parol evidence offered by the plaintiff, to control or vary the absolute deed, was admissible.

On a former occasion between the present parties, it was decided by this Court that the writing in question was only a contract, on certain terms, to re-convey the land; and that it did not render the deed a mortgage (*Reading v. Weston*, 7 Conn. Rep. 143). In the case before us, the parol evidence adduced by the plaintiffs to prove an absolute deed to be a deed on condition, was entirely inadmissible. No case determined in a court of law proving its admissibility, has been cited; nor am I aware that any such case exists. On the contrary, in *Flint v. Sheldon*, 13 Mass. Rep. 143, it was adjudged that an absolute deed of land cannot be varied by parol evidence shewing that it was for the loan and re-payment of a sum of money. This determination is directly in point for the defend-

ants. It has been so frequently adjudged by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol evidence cannot be received, in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract (*Skinner & al. v. Hendrick*, 1 Root, 253; *Stackpole v. Arnold*, 11 Mass. Rep. 27; *Jackson d. Van Vechten & al. v. Sill & al.*, 11 Johns. Rep. 201; 3 Stark. Ev. 1002; 1 Phill. Ev. 423, 441). It is not in opposition to this legal truth, that extrinsic parol evidence, when requisite, is admissible to apply the terms of a written instrument to a particular subject matter, but in perfect consistency with it. This is not to vary or contradict, but to give its intended effect to the contract.

Undoubtedly there have been determinations, some of which have been cited, proving that a stranger is not estopped by a written agreement; but that he may adduce parol testimony to prevent a fraudulent operation of it upon his interests (*The King v. Scamonden*, 3 Term Rep. 474; *New Berlin v. Norwich*, 10 Johns. Rep. 229; 3 Stark. Ev. 1018, 1052). But this principle has no application to the present case. The plaintiffs have not suggested that there was any fraud contemplated and practised on them. The pretence would have been very strange unless it were followed up by explicit testimony to this effect. The inhabitancy of Lucy Darling, *prima facie*, with property sufficient to purchase a farm of the value of 800 dollars, was a benefit to the plaintiffs, and not a prejudice; and all our towns would be pleased in this manner to extend their population.

It will be observed that the question before us is not what a court of chancery may do, in the exercise of its peculiar jurisdiction, but what is the established rule of a court of law. It has been often decided in chancery that parol evidence is admissible to shew that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol (*Washburn v. Merrills*, 1 Day, 139, 1 Pow. Mort. 200; *Strong & al. v. Stewart*, 4 Johns. Chan. Rep. 167; *James v. Johnson & al.*, 6 Johns. Chan. Rep. 417; *Maxwell v. Lady Mountacute*, Prec. in Chan. 526; *Dixon v. Parker*, 2 Ves. 225; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Clark v. Henry*, 2 Cowen, 324; *Slee v. Manhattan Company*, 1 Paige, 48). But these decisions are altogether in support of the determination of the judge in this case. Chancery interposes because a court of law does not afford a remedy. The rule in the courts of law is that the written instrument, in

contemplation of law, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract in writing founded in mistake or fraud (1 Madd. Chan. 41; *Moses v. Murgatroyd*, 1 Johns. Chan. Rep. 128; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Gillespie & ux. v. Moon*, 2 Johns. Chan. Rep. 585; *Noble v. Comstock*, 3 Conn. Rep. 295).

On the whole, it is incontrovertibly clear that the decision complained of is correct, and that a new trial must be denied.

Peters, Williams and Bissell, JJ., were of the same opinion.

Daggett, J., having been of counsel in the cause, gave no opinion.

*New trial not to be granted.*¹

SWART v. SERVICE.

SUPREME COURT OF NEW YORK, 1839.

(21 *Wend.* 36.)

This was an action of ejectment, tried at the Saratoga circuit in May, 1837, before the Hon. John Willard, one of the circuit judges.

The plaintiffs, the children of James Swart, deceased, who was the only child and heir at law of Derick Swart, showed title by *lease and release*, bearing date 24th and 25th September, 1784, executed by John Cuerdon to Derick Swart, conveying 68 acres of land, the premises in question: which instruments of lease and release were duly acknowledged by Cuerdon on the *sixth* day of *April*, 1804. Cuerdon, the releasor of the premises, died in possession of the premises eight or nine years before the trial, having occupied them since the date of the lease and release. The defendant was in possession of the premises at the commencement of the suit. He offered to prove that the *lease and release* was in fact given as a *mortgage* for the security of a debt due from Cuerdon to Swart, and that the debt was paid by Cuerdon to Swart many years before his death: this evidence was objected to, unless the defendant would connect himself with Cuerdon, and the objection was sustained by the circuit judge. The defendant then requested the judge to charge that the evidence established an *adverse possession* in Cuerdon. The judge refused so to charge, and directed a verdict for the plaintiffs, and the jury found accordingly. The defendant now

¹ *McClane v. White*, 5 Minn. 178 (1861); *Gates v. Sutherland*, 76 Mich. 231 (1889), *accord*.

moved for a new trial on the two grounds raised at the circuit, and on the additional ground, that from lapse of time, *payment* of the mortgage might be presumed. . . .

M. T. Reynolds for the defendant.

S. Stevens, for the plaintiffs, insisted that a grantor cannot set up adverse possession against his grantee; and that it is not admissible at law to give parol evidence, showing that a deed is in fact a mortgage, unless fraud or mistake be shown.

By the Court: COWEN, J. The first offer made by the defendant had no dependence on privity of title between him and Cuerdon. It was a simple offer to prove an outstanding title, by turning the conveyance by lease and release into a mortgage, and shewing its extinction by payment. That would divest the title of Swart and of his grandchildren, the plaintiffs; for payment extinguishes a mortgage at law as well as in equity (*Jackson, ex dem. Rosevelt, v. Stackhouse*, 1 Cowen, 122). But independent of that, if Swart were a mere mortgagee, neither he nor those claiming under him could recover (2 R. S. 237, § 37, 2d ed., *Jackson, ex dem. Titus, v. Myers*, 11 Wendell, 533, 538, 539; *Stewart v. Hutchins*, 13 Wendell, 485; *Morris v. Mowatt*, 2 Paige, 586).

It has often been held in the courts of equity of this State, that a deed, though absolute on its face, may, by parol evidence, be shown to have been in fact a mortgage, in the terms offered here; and the same doctrine was held by this court in *Roach v. Cosine*, 9 Wendell, 227, and *Walton v. Cronley's Adm'r*, 14 *id.* 63, equally applicable to a court of law, and has it seems ceased to be the subject of contest; for no objection to the doctrine is now made. For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake were shown in obtaining an absolute deed where it should have been a mortgage. In either case, the deed might be rectified in equity; and perhaps even at law, in this State, where mortgages stand much on the same footing in both courts. Short of that, the evidence is a direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law. But with us the doctrine is settled, and I am not disposed to examine its foundations, at least, without the advantage of discussion.

It is not necessary to say whether the lapse of time might be called in as presumptive proof of payment, though that, as a general doctrine, is too clear to be disputed. If the defendant, on a new trial, shall succeed in making out a mortgage, he will be entitled to such proofs of payment as the nature of his case may afford, subject to the answering proofs of the plaintiffs, provided proof of payment shall become necessary.

It will not, however, be necessary that we see, to complete his de-

fense here, whatever it may be on a bill filed to foreclose by the representatives of Derrick Swart; for since the revised statutes, showing that the plaintiffs or those under whom they claim are mere mortgagees, proves as we have seen, an outstanding title.

There was no evidence of adverse possession in Cuedon. I am of opinion that a new trial should be granted; the costs to abide the event.

THE CHIEF JUSTICE [NELSON] concurred.

MR. JUSTICE BRONSON delivered the following dissenting opinion:

Although I seldom allow myself to depart from the decisions of those who have gone before me in this court, I cannot agree with my brethren in following one or two recent cases which hold that an absolute deed can be turned into a mortgage in a court of law, by parol evidence. Where the transaction was intended as a mortgage, and through fraud or mistake the conveyance has been made absolute in its terms, a court of equity, acting upon well-established principles, can reform the deed. But this will only be done on a direct and appropriate proceeding for that purpose, and after such ample notice to all parties in interest, as will tend most effectually to guard against surprise, fraud and false swearing. And besides, a court of equity can and will protect third persons who may have parted with their money on the faith of the deed. But a court of law has neither power nor process to reform a deed. If parol evidence to contradict or insert a condition in the conveyance can be received at all, it must of necessity be in a collateral proceeding; and it must be received whenever either party chooses to offer it. It can be given without notice, and without the means of guarding against the obvious danger of fraud, surprise and perjury. And beyond this; when a court of law turns an absolute deed into a mortgage, it has no power to protect a *bona fide* purchaser. Other mischiefs will be likely to result from admitting such evidence; but without attempting at this time to point them out, I shall content myself with dissenting from what I deem a new and very dangerous doctrine.

HODGES v. THE TENNESSEE MARINE AND FIRE
INSURANCE CO.

COURT OF APPEALS OF NEW YORK, 1853.

(8 N. Y. 416.)

This was an action brought in the Superior Court of the city of New York upon a policy of insurance upon a hotel in Massachusetts, issued by the defendant to Joseph A. Slamm on the first of September, 1848. On the same day Slamm conveyed the premises to the plaintiff by a deed absolute on its face. On the 4th of the same month Slamm with the assent of the company assigned the policy to the plaintiff "as a collateral security." The property insured was burned in the month of April, 1849.

In the complaint the plaintiff alleged that Slamm had conveyed the insured premises to him by deed, "and that prior to and at the time of the conveyance the said Slamm had been and was legally indebted to him, and as a further security, simultaneously with the conveyance" assigned the policy to him as a collateral security. The defendant in the answer denied the plaintiff's right to recover, on the ground that the assignment was approved on the representation that it was intended as a collateral security upon an indebtedness secured by a mortgage, when in fact the insured premises had been conveyed absolutely to the plaintiff, by means whereof the policy became void. The plaintiff replied, denying that any representation that the indebtedness was secured by a mortgage was made, or that the approval of the defendant was made on the faith of such a representation, and averring that at the time of approving the assignment the defendant was informed of the deed.

On the trial the plaintiff, after giving in evidence the policy and assignment and proving the loss, rested. The defendant's counsel then moved for a nonsuit, which was denied. The deed from Slamm to the plaintiff was then given in evidence, and it was proved by witnesses in the defendant's office that at the time the approval of the assignment was made, it was understood to be collateral and to cover some mortgage, and that the blank for the assignment was there filled up at the request of the plaintiff. The defendant then rested. The plaintiff then called a witness to show that the deed was given merely as a security for money due to him from Slamm. The defendant's counsel objected, on the ground that the plaintiff's pleadings alleged the deed to be an absolute conveyance, and the court sustained the objection. The plaintiff's counsel then moved to amend the complaint by adding an averment that the con-

veyance of the insured premises was made as a collateral security for an indebtedness of Slamm to the plaintiff. The defendant opposed the amendment, on the ground that proof of such proposed allegation was inadmissible, as it went to contradict or vary the deed, and also that it was not allowable under the code of procedure, as it went to make out a new case, and to remedy a failure of proof. The court overruled the objections and allowed the amendment on condition that it be deemed traversed by the answer.

The plaintiff then proved by parol that the deed was given as a collateral security for money owing to him by Slamm, and also to cover expected advances. The parties then rested.

The defendant's counsel then submitted that the testimony showed an absolute title in the plaintiff under the deed: that if as between the immediate parties to it it might be construed as a mortgage, yet as to the defendant it was what it purported to be, an absolute deed. The court overruled the objection and directed a verdict for the plaintiff. The judgment rendered upon the verdict was affirmed by the court *en banc*, and the defendant appealed.

JOHNSON, J. The determination of the judge in allowing the amendment of the pleadings was within his discretionary power, and is not the subject of review, in this Court.

The remaining question in the cause relates to the existence of an insurable interest in Slamm at the time of the assignment of the policy to Hodges and of the loss. If such an interest existed, then the plaintiff's recovery cannot be disturbed.

Upon the evidence there is no doubt of the following facts: That at the time when the insurance was effected, September 1, 1848, Slamm was the owner in fee of the premises insured; that on the 4th of September, 1848, he conveyed the premises to Hodges by a deed absolute upon its face, but intended to operate as a mortgage, and that upon the same day he transferred the policy to Hodges as collateral security, and that this transfer was made by the assent of the company.

If there is no rule of law forbidding us to take notice of the fact that the deed was intended as a mortgage, then beyond all question Slamm as the owner of the equity of redemption in the premises had an interest in the insurance which had been effected by him as the owner of the fee, and the assignment with the company's assent transferred this interest to Hodges as collateral security, and he may upon the ground of the same interest sustain the recovery which has been had in this case.

The question then, taking it most strongly against the plaintiff, is, whether in equity Slamm might have a bill to redeem against Hodges, notwithstanding the deed was absolute upon its face. *Webb v. Rice*, 6 Hill, 219, does not conflict with the proposition that

such a bill might be maintained. It only professes to decide that at law unwritten evidence is inadmissible to show that a deed was intended as a mortgage. From an early day in this State the admissibility of such evidence had been established as the law of our Courts of Equity, and it is not fitting that the question should now be re-examined. Upon the authority of *Strong v. Stewart*, 4 J. C., 167; *Clark v. Henry*, 2 Cow. 332; *Whittick v. Kane*, 1 Paige, 206; *Van Buren v. Olmstead*, 5 Paige, 10; *McIntyre v. Humphreys*, 1 Hoff. 34, with which agree *Taylor v. Little*, 2 Sumner, 228; *Jenkins v. Eldredge*, 3 Story, 293, in all which cases, except *Clark v. Henry*, the point was directly before the Court, we think that the plaintiff's recovery in this case ought to be sustained.

Ruggles, Ch. J., and Gardiner, Jewett and Morse, JJ., concurred with Judge Johnson in favor of affirming the judgment.

Willard,¹ Taggart and Mason, JJ., were for its reversal.

Judgment affirmed.

DESPARD v. WALBRIDGE.

COURT OF APPEALS OF NEW YORK, 1857.

(15 N. Y. 374.)

This action was brought to recover for the use and occupation of a store, in Buffalo, by the defendant, from May 1st, 1851, to August 1st, 1851, which the complaint averred to be worth \$375. It also averred that the defendant on May 1st, 1851, agreed to pay for such use and occupation \$1500 per annum, payable quarterly. The action was tried before a referee, who found the following facts: On the 8th of March, 1850, one Sherwood demised to H. B. Ritchie the store above mentioned, and another adjoining, for two years from the first of May then next, with a right of renewal on certain conditions, Ritchie covenanting to pay a certain rent. On the 17th of November, 1850, Ritchie assigned this lease and his title to the term thereby granted to the plaintiff. At the time of such assignment the defendant was in possession of the premises as a subtenant of Ritchie, under a lease executed April 30th, 1850, for the term of one year from May 1st, 1850.

Sherwood, the original lessor, on the 9th of October, 1850, assigned his interest in the lease executed by Ritchie to Robert Codd for the purpose of securing a debt which he owed to Codd. On the 19th of November, 1850, Ritchie assigned to Codd all his interest as landlord in the sub-lease executed between himself and the de-

¹ The dissenting opinion of Willard, J., is omitted.

fendant. The defendant occupied the premises under the lease from Ritchie, and after the assignment thereof to Codd paid the rent to the latter. On the 1st day of May, 1851, the plaintiff served on the defendant a written notice that he was the assignee of Ritchie's term, and that in case the defendant held over beyond his term, then at the point of expiring, the plaintiff would consider the premises as held and taken by defendant for the term of one year from May 1st, 1851, at the annual rent of \$1500, payable quarterly.

The plaintiff, having proved these facts, rested his case, and the defendant moved for a non-suit, which being refused by the referee, he took an exception. Other exceptions were taken upon the trial, and to the referee's report, which, with the facts relating thereto, sufficiently appear in the opinion of the court. The referee reported that the defendant occupied under an implied agreement to pay what the occupation of the premises was reasonably worth, which he found to be at the rate of \$1200 per annum. Judgment was entered upon his report, which was affirmed by the Supreme Court at general term, and the defendant appealed.

SELDEN, J.¹ . . . The principal question is that which arises upon the exception stated in the referee's report. It is set forth in the answer, in substance, that the assignment of the Sherwood lease from Ritchie to the plaintiff was made at the request and for the benefit of Codd, and for the sole purpose of aiding the latter in the collection of his debt against Sherwood. It is also stated that this debt had been fully paid before May 1st, 1851, by Hiram E. Howard, who had succeeded to the rights of Sherwood in the premises, and that Ritchie, on the 1st of May, 1851, surrendered all his rights in the premises to Howard, whose tenant the defendant then became. These facts the defendant offered to prove and his offer was rejected. . . .

But it is urged that the proof offered was properly excluded for another reason. The assignment to the plaintiff being absolute in its terms, it is said that parol evidence was inadmissible to show that it was intended as security merely; and the case of *Webb v. Rice*, 6 Hill, 219, is cited in support of this position. It was held in that case that in an action at law parol evidence could not be received to show that a deed, absolute upon its face, was intended as a mortgage. It was conceded, however, that the rule was settled otherwise in equity. In the case of *Hodges v. The Tennessee Insurance Company*, 4 Seld. 416, this court held that the rule in equity continued the same since the case of *Webb v. Rice* as before. The only question, therefore, upon this subject is whether the equity rule is applicable to the present case, which is a purely legal action.

¹ Portions of the opinion, dealing with foreign questions, are omitted.

As, however, since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the action, there would seem to be but little room for doubt upon the point (*Dobson v. Pierce*, 2 Kern, 156; *Crary v. Goodman*, *id.* 266; Code, § 150, subd. 2). That a deed absolute on its face was intended as a mortgage, would, before the Code, have been an equitable defense, because it could not have been proved at law. In order that it should now be made available in legal actions, as provided by the Code, the evidence to establish it must be admitted in that class of actions.

It may still be said that, admitting it to be shown that the assignment to the plaintiff was merely collateral to the debt of Sherwood to Codd, and that this debt had been fully paid prior to May 1st, 1851, yet so long as the lease was not reassigned, the legal title remained in the plaintiff, and that Ritchie could not surrender the lease while this title remained outstanding. The answer to this is, that if the assignment was collateral, it is the same as if the condition had been incorporated in the assignment itself, that upon payment of the debt the rights of the assignee should cease; and in such a case it is clear that no formal reassignment would be necessary. Whatever might be the effect of such an assignment in the hands of a subsequent *bona fide* assignee, it cannot be set up by the original assignee as evidence of a subsisting title in him, after full performance of the conditions upon which it was made.

There is still another question of fact which arose at the trial, but which was not passed upon by the referee, viz., whether the assignment to the plaintiff was intended as a security not only for the debt of Sherwood to Codd, but for that of Ritchie also. Should it turn out upon the new trial that the lease was assigned as security for both debts, and either remained unpaid on the 1st of May, 1851, then the case on the part of the plaintiff would be made out.

The judgment must be reversed and a new trial must be ordered, with costs to abide the event.

All the judges who had heard the argument concurring in this opinion,
*New trial ordered.*¹

¹ That such evidence is admissible at law, see *Jackson v. Lodge*, 36 Cal. 28 (1868), elaborately reviewing the authorities; *McAnnulty v. Seick*, 59 Ia. 586 (1882); Calif. Civ. Code, 1885, § 2925; No. Dak. Civ. Code, 1895, § 4703.

As to the weight of evidence required to prove an absolute deed a mortgage, see *Wilson v. Parshall*, 129 N. Y. 223 (1891).

CAMPBELL v. DEARBORN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

(109 *Mass.* 130.)

Bill in equity,¹ filed July 12, 1869, to compel a reconveyance of land by the defendant to the plaintiff, on the ground that the plaintiff's conveyance of it to the defendant, although in form absolute, was in substance a mortgage.

The bill alleged that the plaintiff on June 11, 1866, agreed with Artemas Tirrill for the purchase by him from said Tirrill of a parcel of land in Charlestown, and at the same time Tirrill gave him a bond to convey the land at any time within three years from said June 11, upon the payment to him of \$5500, the plaintiff to pay all assessments upon the land meanwhile; that since taking the bond the plaintiff has occupied the land; that in the early part of June, 1869, he made arrangements to borrow the sum of \$5500 from Charles J. Walker, in order to tender the same to Tirrill, and secure performance of his obligation to convey, within the time fixed in the bond; that on June 11, 1869, being disappointed in finding Walker, he met the defendant; that the defendant expressed regret that the plaintiff should be obliged to lose fulfilment of the bond through not having in time the money required, and voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed; that the defendant and the plaintiff went immediately to Tirrill and tendered to him said sum of \$5500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869; that upon leaving Tirrill the defendant said to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed to him to sign, which upon reading he found to be drawn to convey the land in fee simple to the defendant; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would

¹ The statement of facts has been somewhat curtailed.

have the same effect; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11 executed and delivered said deed to the defendant; and that it was recorded in the registry of deeds at the same time with Tirrill's deed. . . .

The defendant, in his answer, denied that he ever made or offered to make any loan to the plaintiff; alleged that, on the contrary, he refused a request of the plaintiff for a loan; and further alleged that "the defendant agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name," and the plaintiff agreed that immediately on payment of the sum to Tirrill the land should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto;" that thereupon the defendant paid the \$5500 to Tirrill, and Tirrill executed and delivered to the plaintiff a deed of the land. . . .

WELLS, J. Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest; and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms (*Blodgett v. Hildreth*, 103 Mass. 484). His agreement with the defendant for a reconveyance cannot be enforced as a contract for an interest in lands (Gen. Sts., c. 105, § 1), nor will it create an express trust (Gen. Sts., c. 100, § 19). The question then is, Can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton v. Fay*, 10 Allen, 505. Some suggestions were made as to the bearing of the statute of frauds upon it, in *Glass v. Hulbert*, 102 Mass. 24. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the statute of frauds, to admit

parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.

What will justify a court of chancery in setting aside a formal deed, and giving the grantor an opportunity to redeem the land, on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In Story Eq., § 1018, it is stated in general terms to be "fraud, accident and mistake." In 4 Kent Com., 6th ed., 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake." "It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds" (*Dixon v. Parker*, 2 Ves. Sen. 219, 225). Similar declarations are to be found in *Walker v. Walker*, 2 Atk. 98; *Joyous v. Statham*, 3 Atk. 388, and *Maxwell v. Mountaine*, Pre. Ch. 526; and adjudications in *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alvord*, 2 Root, 196, and *Brainerd v. Brainerd*, 15 Conn. 475; and see Story Eq., § 768.

This indeed is only one form of application of the general rule of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass v. Hulbert*, 102 Mass. 24, see *Bartlett v. Pickersgill*, 4 Eden, 515; s. c. 1 Cox Ch. 15; Browne on St. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit, 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5500; 2d, that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the de-

fendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant. "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery (*Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Taylor v. Luther*, 2 Sumner, 228; *Flagg v. Mann*, *ib.* 486; *Jenkins v. Eldredge*, 3 Story, 181; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Wyman v. Babcock*, 2 Curtis C. C. 386, 398; *s. c.* 19 How. 289). Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell v. Southard*, 12 How. 139, 148, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void (4 Kent Com., 6th ed., 159; Cruise Dig., Greenl. ed., tit. xv., c. 1, § 21; 2 Washb. Real Prop., 3d ed., 42; Williams on Real Prop., 353; Story Eq., § 1019; Adams Eq., 112; 3 Lead Cas. in Eq., 3d Am. ed.; White & Tudor's notes to *Thornborough v. Baker*, pp. 605 [*874] & seq.; Hare & Wallace's notes to s. c. pp. 624 [*894] & seq.).

The rule has been frequently recognized in Massachusetts, where until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal (*Erskine v. Townsend*, 2 Mass. 493; *Kelleran v. Brown*, 4 Mass. 443; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 2 Pick. 206, 211; *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Eaton v. Green*, 22 Pick. 526). The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the St. of 1855, c. 194, § 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages" (Gen. Sts. c. 113, § 2). The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute

deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practised, or an evasion of the right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud" (*Colterell v. Purchase*, Cas. temp. Talbot, 61). See also *Barnhart v. Green-shields*, 9 Moore P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mellor v. Lees*, 2 Atk. 191; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for averring the effect of the writings, by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized both at law and in equity (*Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. 464; 1 Greenl. Ev., § 284; Perry on Trusts, § 226).

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearn*, 2 Lead Cas. in Eq., 3d Am. ed., 676, and to *Thornborough v. Baker*, 3 *ib.* 624. See also Adams Eq., 111; 1 Sugd. Vend., 8th Am. ed., Perkins notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here (2 Washb. Real Prop., 3d ed., 35 & seq.). Upon the whole, we are convinced

that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. "If the purchaser, instead of taking the risk of the subject of the contract on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mortgage security" (1 Sugd. Vend., 8th Am. ed., 302, in support of which the citations by Mr. Perkins are numerous). But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment (*Eaton v. Green*, 22 Pick. 526, 530).

Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect; yet the absence of such proof is far from being conclusive to the contrary (*Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Russell v. Southard*, 12 How. 139; *Brown v. Dewey*, 1 Sandf. Ch. 56). When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of

a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists (Story Eq., §§ 239, 245, 246); and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so (Kerr on Fraud and Mistake, 186 and note; *Wharf v. Howell*, 5 Binn. 199).

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance (*Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & Jones, 16). These several considerations have more or less weight, according to the circumstances of each case (*Conway v. Alexander*, 7 Cranch, 218; *Bentley v. Phelps*, 2 Woodb. & Min. 426). It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

*Decree accordingly.*¹

¹ See *Horn v. Keteltas*, 46 N. Y. 605 (1871).

The view that fraud, mistake or undue influence must be shown, once general, has been for the most part abandoned. See, for example, *Brainerd v. Brainerd*, 15 Conn. 575 (1843) and *French v. Burns*, 35 Conn. 359 (1868). It survives, however, in a few States (*Norris v. McLean*, 104 N. C. 159 [1889]; Ga. Code, 1895, § 2725; Miss. Ann. Code, § 4233), and its influence may be traced in many others (*Sutphen v. Cushman*, 35 Ill. 186 [1864]; *Stinchfield v. Milliken*, 71 Me. 567 [1880]; *Russell v. Southard*, 32 How. 139, 147-8 [1851]).

"It will be perceived that in none of these cases did the court attempt

N. H. GEN. LAWS, c. 136. § 1. Every conveyance of lands, made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage within the meaning of this chapter.

§ 2. No conveyance in writing of any lands shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other thing to be performed.

PENN. LAWS, 1881, No. 91. § 1. Be it enacted, &c., That no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed by the recorder.—Approved the 8th day of June, A. D. 1881.

to range the jurisdiction to turn an absolute deed into a mortgage, by parol evidence, under any specific head of equity, such as fraud, accident or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee. For when we seek in the standard authorities for the ground or principle upon which the doctrine of the admissibility of parol evidence originally rested, it will be found in the old and familiar heads of equity, such as fraud, accident, mistake or trust. Chancellor Kent, 4 Com. 143, states the doctrine thus: 'A deed, absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case, though the defeasance was by an agreement resting in parol, for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake.' Story, speaking of the same subject, says: 'Even parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money' (2 Eq. Jur., § 1018, note 2).—*Per McAllister, J., in Ruckman v. Alwood*, 71 Ill. 155 (1873).

GA. CODE, 1895. § 2725. A deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.¹

¹ Miss. Ann. Code, § 4233, is to the same effect.

CHAPTER III.

THE OBLIGATION SECURED.

SECTION I. IS AN OBLIGATION NECESSARY?

ACTON v. ACTON.

COURT OF CHANCERY, 1704.

(*Finch, Pre. Ch. 237.*)

THE plaintiff's husband before marriage gives her a bond to leave her 1000*l.* if she survived him, and the same day marries her; and some years after dies intestate, leaving a freehold and copyhold estate all in mortgage.

The plaintiff takes out administration, but the personal estate not being near sufficient to satisfy the said bond, she brings her bill against the heir and mortgagee to redeem, and be let in to have satisfaction of the said bond.

The defendant, the heir, urged, that by the marriage the bond became void in law, and could not be maintained here, especially against him, who is chargeable only in such case by being specially named; and though it would be supported as a marriage agreement in writing, yet could only charge the personal estate; and that, however, it cannot affect the copyhold.

On the other side it was said, this was once a good bond, and the heirs are bound in it; and though by the marriage it lost its force in point of law, yet in equity it will have the same force as before, and bind the husband, and entitle the plaintiff to a redemption; as if the obligee loses his bond, yet equity will set it up, and give him the same advantage of it, as if it were in being; and if equity does support it, it must support it, not only as an agreement in writing, but as a bond, and therefore the plaintiff ought to have the redemption as a bond creditor would have had; and though it was agreed, it would not entitle her to redeem the copyhold, if mortgaged by itself, yet when that and the freehold are mortgaged together, she must redeem the whole, and cannot redeem by parcels; and though

the heir on payment of what is due on the mortgage will have back the copyhold from us, yet we shall hold the freehold till satisfied the bond.

LORD KEEPER [WRIGHT] said, if the bond were executed (which being doubtful, was ordered to be tried) the court would support it as a bond; and that the freehold and copyhold being mortgaged together, the plaintiff should redeem both.¹

BUCKLIN v. BUCKLIN.

COURT OF APPEALS OF NEW YORK, 1864.

(1 Abb. App. Cas. 242.)

Olive E. Bucklin brought this action in the Supreme Court against William and George R. Bucklin, to foreclose a mortgage made by their ancestor, William Bucklin, Sr.

William Bucklin, Sr., and his wife, Esther, previous to his executing this mortgage had separated, and she had filed a bill in chancery for a judicial separation (*a mensa et thoro*) on the ground of his cruel treatment of her. In the bill she prayed that he might be compelled to maintain her, and that the custody of their infant daughter, Olive E., might be awarded to her. Upon the bill she obtained an injunction restraining him from molesting the child.

In order to compromise the controversy and stay the prosecution of the suit, the husband, William Bucklin, Sr., agreed to make provision for the support of his wife and the infant, together, and separate from himself, and convey a house and lot to the child within six months.

To effect this settlement the mortgage in suit was executed to Vedder Green (who appeared as the next friend of the wife in her divorce suit) and was expressed to be made to him in trust for the wife and infant daughter.

The mortgage, which was set forth in the complaint, recited the

¹ "As to the objection that here was no covenant for the payment of the principal or interest, he said that was not material, the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual—viz., for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption, since such conveyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage."—Sir Joseph Jekyll, *arguendo*, in *Floyer v. Lavington*, 1 P. Wms. 268 (1714). And see Lit., § 338, and Co. Lit., 209, a, b, p. 11, *supra*.

above facts, and after providing for the said support of the wife and daughter, and the suspension of proceedings in the suit, without modification or discontinuance, the mortgage contained the following language: "Now, for the purpose of securing the performance by the said William, of the aforesaid agreements and covenants on his part to be performed, this indenture witnesseth—that the said William Bucklin, in consideration of the premises, and also on consideration of the sum of one dollar, paid to the said William by the said Vedder Green, the receipt of which sum is hereby confessed and acknowledged, hath granted, bargained, sold," &c., "and doth grant," &c., to Vedder Green and his heirs and assigns forever (here was inserted the description of the lands; habendum to him, his heirs, and assigns, forever), "provided, that if the said William Bucklin shall within the period of six months convey to Olive Esther Bucklin real estate of the value of one thousand dollars, to consist of a dwelling," &c., and if he shall permit Esther to occupy the same without molestation, and if he shall pay to Esther Bucklin three hundred dollars annually during their joint lives, and shall permit the said Esther Bucklin to have the custody, management, &c., of said Olive Esther Bucklin, without any interference on his part (and if he should also perform certain other conditions relating to personal property), then this indenture shall be void. And it is hereby declared that this mortgage is given to Vedder Green in trust for the benefit of Esther Bucklin and her infant daughter, Olive Esther Bucklin. And in case the above conditions on the part of said William, or any of them, shall be broken, and it shall at any time hereafter be necessary to enforce this mortgage, the amount that shall be recovered on said mortgage shall be recovered for the benefit of the said Esther and her infant daughter or the survivor of them.

The complaint then averred that Bucklin, Sr. wholly failed to convey land and dwelling, &c., as he agreed (though payment of the annuity was admitted), and demanded judgment for the foreclosure of the mortgage for the sum of one thousand dollars, the value of the land and dwelling promised to be conveyed, and interest, &c.

When the mortgage was made, in 1836, the child (the present plaintiff) was about three years of age. The trustee, Vedder Green, died in 1841, the husband and wife died in 1843 and 1844. In 1857, the daughter, coming of age, procured an order of court appointing her to enforce the trust and bring an action in her own name.

The defendants were heirs of the mortgagor in possession.

The judge before whom the cause was tried sustained the mortgage; found that the husband and wife never afterward cohabited.

though for a short time they resided in the same house, and he gave judgment for plaintiff with interest from the date of the mortgage.

The Supreme Court, at General Term, affirmed this judgment, holding that this was an action on a sealed instrument, and, if the cause of action had accrued after the Code of Procedure went into effect, it would have been governed by section 90 of the Code, but that as it had accrued before that time, it was governed by 2 R. S., c. 8, tit. 3, art. 1, § 9, which enacts that the time which shall have elapsed between the death of any person, and the granting of letters testamentary or of administration on his estate, shall not be deemed any part of the time limited by any law, for the commencement of actions by executors or administrators. That had the trust descended to the personal representatives of the trustee, this cause of action would have been saved from the operation of the statute; and that the *cestui que trust* should not be prejudiced by having the trust fall on the court of chancery, as it did on the death of Green, but that an analogous rule should be applied, and the whole term of twenty-one years allowed in which to bring the action, which would prevent it from being barred.

From that judgment the defendants appealed to this court.

F. Kernan for defendants, appellants.

John H. Reynolds for plaintiff, respondent.

By the Court: DEXIO, Ch. J. The mortgage, so far as it is now sought to be enforced, was created, among other objects, to secure the plaintiff, then an infant of tender age, a portion of her father's property, to aid in her maintenance during her infancy, and to furnish her with a small independent estate in real property. The differences which had arisen between her parents presented the occasion for this gift; but its validity did not depend upon the merits of that controversy, nor yet upon the legal effect of the agreement for a separation between her father and mother, nor upon the legality of the provisions made by the former for the latter. The contract, so far as it relates to that provision, has either been performed or it is now incapable of performance. The party entitled to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.¹

¹The second portion of the opinion, dealing with the effect of the lapse of time, is omitted, the conclusion being reached that the Statute of Limitations was not a bar.

1. Where the rights of creditors do not stand in the way, and there appear not to have been any in this case, it is perfectly lawful for a parent to make such provision out of his estate for a child or children, by present, gift or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based on a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. The instrument executed by William Bucklin to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land, and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant; but for all substantial purposes it has the effect of a deed of bargain and sale (1 R. S., 738, 739, §§ 137, 138, 142). At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established, this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is, of course, a technical view of the nature of a mortgage.

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor only.

But the defendants' position is formal also. They insist that courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to to sustain that position (*Duvoll v. Wilson*, 9 Barb. 487, and cases cited; but see *Souveryby v. Arden*, 1 Johns., Ch. 240, 266, and cases referred to by Chancellor Kent). If the settlement be an executed one, like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of the land, but yet, in point of form, an equity. The mortgagor may, it is true, come into a court of equity to enforce his mortgage, as the mortgagee must in order to redeem. The reason why a mortgagee must resort to equity is not because the mortgage is an executory transaction, and

requires the aid of a court of chancery to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase, "once a mortgage, always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute foreclosure. Formerly, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possession without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagor (*Mickles v. Dillaye*, 17 N. Y. 80; *Mickles v. Townsend*, 18 *id.* 575). The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

A point is made that the mortgage is invalid because made to Green as a trustee, he confessedly having no beneficial interest, and because the purposes of the trust are not such as are contemplated by the fifty-fifth section of the chapter of the Revised Statutes relating to uses and trusts. Now, although for the purpose of showing that a mortgage is an executed conveyance and not a mere executory agreement, I have recurred to the legal nature of that instrument as a conveyance of the land mortgaged, I am not prepared to concede that it should be regarded as "a disposition of the land by deed" within the meaning of the article of the Revised Statutes respecting uses and trusts (1 R. S., 727). The modern idea of a mortgage is a pledge of the land to secure the payment of money. The statute relates to interests in lands, properly so called, and not to collateral pledges made for the purpose of securing interests in personalty. Debts secured by mortgage are declared to be personal assets and go to the personal representatives (2 R. S., 82, § 6, subd. 8).

A trust of personalty is not within the statutes of uses and trusts, and may be created for any purpose not forbidden by law. This mortgage is not, therefore, at all within the influence of the fifty-fifth section, or within the one which abolishes uses and trusts. But

if it were otherwise, and if the interest in the land conveyed by a mortgagor to a mortgagee were regarded as within the purview of that section, the only effect in this instance would be to annihilate the title and strike out the name of Green, the trustee, and to invest the beneficiaries with the title nominally conferred on Green. This effect is produced by section 49 of said article, which declares that if a disposition of land be made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee; and section 47, which confers upon the beneficiary in such cases an estate of the same quality as his beneficial interest. Again, a trust may, by section 55, also be created to sell lands for the purpose of satisfying any charge thereon. This does not require a pre-existing charge. One created at the same time and by the same instrument which contains the conveyance would be sufficient to bring the disposition within the terms and spirit of the section, and would embrace the case of a mortgage.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands to the value of one thousand dollars to and for the benefit of the plaintiff.

H. R. Selden, J., was absent. All the other judges concurred.

Judgment affirmed, with costs.

CAMPBELL v. TOMPKINS.

COURT OF CHANCERY OF NEW JERSEY, 1880.

(32 N. J. Eq. 170.)

Bill to foreclose. On final hearing on pleadings and proofs.

THE CHANCELLOR [RUNYON]. This suit is brought to foreclose a mortgage given, October 13th, 1868, by Daniel F. Tompkins and his wife to the complainant, on land of Mrs. Tompkins, to secure the payment, according to the bond of Mr. Tompkins to the complainant, of that date, of \$2100 in one year from the date thereof, with interest, and all national, state, county, city and township taxes which might be assessed upon the money loaned and thereby secured or upon the mortgage or bond. The defense set up by the mortgagors in their answer is, that only \$1100 were lent, and the rest of the \$2100 was an allowance by way of compensation for the trouble and expense to which the firm of

Campbell, Lane & Co. (of which the complainant was a member and for which the bond and mortgage were taken, though taken in the name of the complainant alone) had been subjected by reason of the defense made by the firm of Nichols & Tompkins (of which Mr. Tompkins was a member), against certain promissory notes put by the latter firm on the money market, and bought by Campbell, Lane & Co. The notes amounted in the aggregate to over \$7000. The result of the litigations was that Campbell, Lane & Co. recovered only what they had paid for the notes, with interest. The litigations were ended and the money for which judgment was recovered therein paid before the mortgage was given.

When the agreement for the mortgage was made, Mr. Tompkins applied to the complainant for a loan of \$1000 on mortgage of the premises described in the mortgage. Wholly of his own accord, and without suggestion from the complainant, or any member of his firm, or any one else on his or their account, Mr. Tompkins proposed that if the loan was made the mortgage would be given for such an amount as to include a sum sufficient to compensate Mr. Campbell's firm for their expense and trouble in prosecuting the suits upon the notes. This proposition was wholly voluntary on his part, and the amount of the proposed compensation (\$1000) was fixed by him.

Mr. Campbell acceded to the proposition thus made, and made the desired loan, the amount of which was, at the request of Mr. Tompkins, raised from \$1000 to \$1100, and took the mortgage. In 1876, before the commencement of this suit, the complainant bought the interest of his partners in the mortgage, so that when this suit was brought he was the sole owner of the mortgage.

By their answer, Mr. and Mrs. Tompkins insist that, as to the \$1000 included in the mortgage as compensation for expense, trouble, &c., in the litigations on the notes, the mortgage was without consideration, and that, therefore, there should be no decree for that money; or, if there should be any decree on that account, it should be for a smaller sum. They insist that \$1000 was an unreasonably large allowance on that account. Neither in the answer nor in the testimony is any fraud alleged or even hinted at. The conduct of the complainant appears to have been entirely fair. Nor is it alleged that any manner of deceit or misrepresentation was practised on Mrs. Tompkins, nor that she was not fully apprised of all the particulars of the transaction which resulted in the mortgage. The only question, therefore, is, whether the defence of want of consideration is available to the mortgagors.

The seals to the bond and mortgage import a consideration, and before the passage of the act "concerning sealed instruments," which was approved April 6th, 1875 (Rev. p. 387), neither a court

of law nor equity would allow the consideration of such instruments to be inquired into with a view to declaring the instrument void for want of consideration, but a court of equity would do so for the purpose of ascertaining what was due upon it (*Farnum v. Burnett*, 6 C. E. Gr. 87). That act provides that in every action upon a sealed instrument or where a set-off is founded upon a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted as if such instrument was not sealed. That act is a mere change of the rule of evidence and does not operate to make a valuable consideration necessary where the requisite did not exist when the contract was made (*Aller v. Aller*, 11 Vr. 446).

As before stated, the mortgage in this case was given in 1868, prior to the passage of that act. It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise, the absolute control of the owner over his property is taken away, for he would not be permitted to give it away in his lifetime by deed. The mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, although it was intended merely as a gift; and, when executed and delivered, it is as valid as if it were based upon a full consideration, and it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed, conditional transfer of the real estate mortgaged (*Brooks v. Dalrymple*, 12 Allen, 102; *Bucklin v. Bucklin*, 1 Abb. App. Dec. 242; *Jones on Mort.*, § 614).

In this case there was no fraud, illegality or oppression. The act of the mortgagors in giving the mortgage to secure the payment of the compensation, was entirely voluntary and was the result of Mr. Tompkins's unsolicited and uninvited proposition. He made it part of the consideration of the loan which he solicited, and it is, perhaps, not too much to say that without this inducement the loan would not have been made.

The voluntary mortgage by the wife of her land to secure the payment of her husband's bond is binding upon her not only so far as the loan is concerned, but as to the debt voluntarily created by him against himself and arising from a merely moral obligation which he acknowledged without demand or even solicitation, but solely from his sense of justice. A married woman may, with her husband, mortgage her land to secure the payment of the debt of her husband or of any other person, for the payment of which she is in no way liable and in which she has no interest (*Jones on Mort.*, § 113). And her mortgage, given to secure the payment of the bond of her husband, will not be regarded as having no validity or bind-

ing effect simply because the consideration of the bond is an obligation merely moral and not enforceable at law or in equity.

There will be a decree in accordance with these views.

BAIRD v. BAIRD.

COURT OF APPEALS OF NEW YORK, 1895.

(145 N. Y. 659.)

Appeals from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made October 2, 1894, which affirmed judgments in favor of defendants entered upon decisions of the special county judge of Monroe County on trial at Special Term, dismissing the complaint in each action.

The following is the opinion in full:

"Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year, his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1500 each on the farm. No bond was given and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages the testimony tended to show, and the trial court found, that they were not intended to

secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

“The plaintiff’s right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient and the fact is not open to question or review here.

“The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied (*Davis v. Bechstein*, 69 N. Y. 440; *Hill v. Hoole*, 116 *id.* 299; *Briggs v. Langford*, 107 *id.* 680; *Thomas on Mort.* § 847; *Jones on Mort.* § 1297).

“The point upon which the learned counsel for the plaintiff

relies is that evidence was not admissible at the trial to wholly contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

"The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given, that they were not recorded, and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose or for the payment of either principal or interest though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225). "The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind (*Gray v. Barton*, 55 N. Y. 68; *Best v. Thiel*, 79 *id.* 15; *Torry v. Black*, 58 *id.* 185; *Home Ins. Co. v. Watson*, 59 *id.* 395; *Dubois v. Hermance*, 56 *id.* 673).

"There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no stoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations unless they were intended as such when made, and this is negated by the findings.

"Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their

enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge Rapallo in the case of *Hutchins v. Hutchins*, 98 N. Y. 56, in which it is said: 'It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration.'

"That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid, and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons. The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent (*Juilliard v. Chaffee*, 92 N. Y. 529). The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate (*id.*). Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties (*Grierson v. Mason*, 60 N. Y. 394). So, a conveyance absolute in form may be shown, as against the heir at law of the grantee, to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm (*Bank v. Grote*, 110 N. Y. 12). Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel,

but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear. The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause or the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be varied by parol proof to the contrary, but that rule was gradually abandoned and now that clause is open to parol proof (*McCrea v. Purmort*, 16 Wend. 469; *Hebbard v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 *id.* 269). So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense (3 R. S. [5th ed.] 691, §§ 77, 78; Code, § 840).

“There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be varied by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any farther, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain

that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment: *Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 *id.* 357; *Andrews v. Brewster*, 124 *id.* 433. So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case (*Briggs v. Langford*, 107 N. Y. 680; *Hannan v. Hannan*, 123 Mass. 441; *Wearse v. Peirce*, 24 Pick. 141; *Hill v. Hoole*, 116 N. Y. 299; *Davis v. Bechstein*, 69 *id.* 440; *Parkhurst v. Higgins*, 38 Hun, 113). There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land (*Matter of Mitchell*, 61 Hun, 372). A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful, or practicable, or possible, or the contrary, is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery, and no other. Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money.

“The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgages were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds.

“The acts and declarations of the mortgagee with respect to the consideration, conditions and purpose under which the instruments

were made and delivered, being admissions against his interests, would have been competent proof against him in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff who represents him (*Holmes v. Raper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225; *Hobart v. Hobart*, 62 *id.* 80).

"We think there was no error in the result and that the judgments should be affirmed, with costs."

W. A. Sutherland for appellant.

George A. Benton for respondent.

O'Brien, J., reads for affirmance.

Bartlett, J., concurs; Peckham and Gray, JJ., concur in the result; Andrews, Ch. J., dissents; Haight, J., not sitting.

Judgments affirmed.

CHAPTER III. (*Continued*).

SECTION II. ILLEGAL OBLIGATIONS.

WHALEY v. NORTON.

HIGH COURT OF CHANCERY, 1687.

(1 *Vern.* 483.)

The bill was to be relieved against a bond and judgment, defeazanced for the payment of 400*l.* to the defendant; and the bill charged, that whereas the security recited 400*l.* to have been lent and paid by the defendant to the plaintiff, that in truth the money was never really lent or paid: the defendant by answer confessed, that the 400*l.* was not lent or paid by her, and that it was never meant or intended so to be, and that it was the mistake of the scrivener in making the security after that manner, for that the 400*l.* thereby intended to be secured was the free gift of the plaintiff unto the defendant.

The truth of the case was, that the defendant was for some time kept by the plaintiff, and this 400*l.* was given her upon that account; but of that no notice was taken in the bill, and the counsel for the defendant insisted, that it being a free gift, no equity could relieve against it; and cited the case of *Bourman* and *Uphill*, which was this very case in point, and the equity laid in the bill the same, to wit, that it purported to be a security for money lent; whereas no money was really lent or paid: and the Court would not relieve in that case, though the gift was upon the like account: and the case of *Peacock* and *Mainlin* was also cited.

THE MASTER OF THE ROLLS [SIR JOHN TREVOR] said, that there would be a difference in these cases between a contract executed and executory; and that this Court would extend relief as to things executory, which if done, it maybe might stand: but as this case was, he saw no ground to relieve the plaintiff, nothing appearing to him, but it was a free and voluntary gift, without anything of *turpis contractus*: and in case it had been so, yet we know that Adam was punished, though tempted by Eve; because he would be tempted. But if it had been charged in the bill, that the defendant was a common strumpet, and she commonly dealt and

practised after that sort, and used to draw in young gentlemen, in such case he thought it reasonable the Court should relieve; and the plaintiffs had, in this cause, proved as much; but the defendant's counsel opposed the reading to that matter, by reason it was not charged in the bill, nor in issue in the cause: so they prayed liberty to amend their bill, and to charge that special matter, paying the costs of that day, and of the depositions taken in the cause.¹

W—— v. B——.

B—— v. W——.

THE ROLLS COURT, CHANCERY, 1863.

(32 *Beav.* 574.)

THE MASTER OF THE ROLLS (SIR JOHN ROMILLY).²

This is a case which has caused me considerable pain; but I can state very shortly why I think that this deed cannot be supported.

There are two suits, one to enforce a deed of the 20th of August, 1855, by which, in consideration of 1700*l.* lent by the defendant Mr. W. to Mr. B., Mr. B. and his five children (two only of whom were adult) covenanted to surrender copyholds for securing that amount. The second suit is instituted by B. and his two daughters to set that deed aside.

The case is a very painful one in this respect: It appears that Mr. W. seduced C., one of Mr. B.'s daughters, and that in June, 1855, Mr. T., a brother-in-law of Mr. B., had pointed out to him the attentions paid to his daughter by Mr. W., that it was a matter of notoriety in the town in which they resided, and that it was essential to put a stop to it. At the same time, Mr. T. told him

¹ "Has there been any case upon that distinction [between a recompense for past and a provision for future cohabitation], where the court, finding the woman in actual possession of the property, has upon that ground taken it out of her hands? The distinction upon the doctrine of *procurum pudicitie* has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors."—*Per* Lord Eldon, L. Ch., in *Rider v. Kidder*, 10 Ves. 360, 366 (1805).

² "Even in cases of a *procurum pudicitie*, the distinction has been constantly maintained between bills for restraining the woman from enforcing the security given, and bills for compelling her to give up property already in her possession under the contract. At least there is no case to be found where the contrary doctrine has been acted on, except where creditors were concerned"—Story, *Eq. Juris.*, § 299 (1841).

³ The statement of facts and a portion of the opinion are omitted.

he should require the money due to him to be repaid, which consisted of 1100*l.*, and two sums of 300*l.* each for which he was surety. When T. required the money to be repaid, Mr. B. applied to Mr. W. for an advance. A day or two after, in June, 1855, in consequence of the strong remonstrances of Mr. T. and of Mrs. T., who was the aunt of this young lady. Mr. B. wrote a letter to Mr. W., in which he told him, that in consequence of the reports, he must discontinue his visits to his house. In answer to this, Mr. W. wrote that there was no truth in the suggestion, but that he acquiesced in the propriety of the refusal to allow a continuance of his visits. On the following day after writing this letter, Mr. W. wrote to Mr. B. and told him that he would advance the money required by Mr. B., and a treaty took place, and it was arranged that the advance should be made, and it was effected on the 20th of August, 1855, about two months after.

It is impossible to read the letters and the evidence in this case, and not come to the conclusion, that a part of the consideration for the advance of the money by Mr. W. and for the security which was given, was a promise that W. should be at liberty to continue his visits to the daughter. It is impossible that the father should not have been aware, after all the representations made to him by Mr. T. and by the public talk, that Mr. W. had, at that time, actually succeeded in seducing, or that he was attempting to seduce, his daughter. It is impossible to doubt the fact that the money was given in order that Mr. W. should be allowed to continue his attentions to the daughter, whether successful or not.

I am of opinion, in that state of the evidence, that no person can come into a Court of Equity and ask that effect should be given to a deed, the consideration for which was of that character. The Court is compelled to look at the whole of the consideration, and cannot execute the deed in part. And I am of opinion that no person can, on such evidence and facts as are here established, require this Court to give any assistance to either party concerned in such a transaction.

It occurred to me that I could leave the matter there, but, observing that others besides the parties to the corrupt bargain are affected by this deed, I am of opinion that I ought not. I am also influenced by this consideration, that, upon an action on the deed, the same defense would be open at law, and I think that I should not act properly, if I did not, as far as I am able, put an end to this painful case. Without saying anything as to what might be done in an action at law to recover the money lent, I shall order the deed to be delivered up to be cancelled.

The grounds on which I decide this case make it unnecessary for me to enter into the consideration whether proper protection

was afforded to the two young ladies in this matter; but it would be difficult to see how either of these deeds of 1853 and 1855 could be supported in this Court as against them.

BOSANQUETT v. DASHWOOD.

COURT OF CHANCERY, 1735.

(*Cas. temp. Talb.* 38.)

The plaintiffs being Assignees under a Commission of Bankruptcy against the two Cottons, brought their Bill against Dashwood the Defendant, as Executor of Sir Samuel Dashwood, who had in his Life-time lent several Sums to the Cottons, the Bankrupts, upon Bonds bearing *6l. per Cent.* Interest; and had taken Advantage of their necessitous Circumstances, and compelled them to pay at the Rate of *10l. per Cent.* to which they submitted, and enter'd into other Agreements for that Purpose; and so continued paying *10l. per Cent.* from the Year 1710, to the Year 1724.

'Twas decreed at the Rolls that the Defendant should account; and that for what had been really lent legal Interest should be computed and allowed; and what had been paid over and above legal Interest should be deducted out of the Principal at the Time paid; and the Plaintiffs to pay what should be due on the Account; And if the Testator had received more than was due with legal Interest, that was to be refunded by the Defendant, and the Bonds to be delivered up.

Mr. Solicitor General and *Mr. Fazakerley* insisted for the Defendant, That 'twas hard to inquire into a Transaction of so long standing, the Parties having on all sides submitted to the Agreement, and that *Volenti non fit Injuria*; which was the Reason of the Lord Holt's opinion in the Case of *Tomkins versus Barnett*, 1 Salk. 22. why an Action would not lie for Recovery of Money paid upon an usurious Contract; and that the Bankrupts being *Participes Criminis*, should have no more Advantage here than at Law. Nothing was more common than to admit the Party, after he had paid the Money, to be an Evidence in an Information upon the Statute of Usury; which shews he is, in the Eye of the Law, after Payment, an indifferent Person; And compared it to the Case of Gaming; where, if the Loser pays the Money, and does not sue for the Recovery within the Time prescribed by the Act, he is barred. And cited the case of *Walker versus Penny*, 2 Vern. 78, 145.

LORD CHANCELLOR [TALBOT]. There is no Doubt of the Bonds and Contracts therein being good: But it is the subsequent Agree-

ment upon which the Question arises. It is clear that more has been paid than legal Interest. That appears from the several Letters which have been read, which prove an Agreement to pay 10*l. per Cent.* and from Sir Samuel Dashwood's Receipts; but whether the Plaintiffs be intitled to any Relief in Equity, the Money being paid, and those Payments agreed to be continued, by several Letters from the Cottons to Sir Samuel Dashwood, wherein are Promises to pay off the Residue, is now the Question?

The only Case that has been cited, that seems to come up to this, is that of *Tomkins versus Barnett*; which proves only, that where the Party has paid a Sum upon an illegal Contract, he shall not recover it on an Action brought by him. And tho' a Court of Equity will not differ from the Courts of Law in the Exposition of Statutes; yet does it often vary in the Remedies given, and in the Manner of applying them.

The Penalties, for Instance, given by this Act, are not to be sued for here; nor could this Court decree them. And though no *indebitatus assumpsit* will lie, in Strictness of Law, for receiving of Money paid upon an usurious Contract; yet that is no Rule to this Court, which will never see a Creditor running away with an exorbitant Interest beyond what the Law allows, though the Money has been paid, without relieving the Party injured. The Case of Sir Thomas Meers, heard by the Lord Harcourt, is an Authority in Point, that this Court will relieve in Cases which (though perhaps strictly legal) bear hard upon one Party. The Case was this: Sir Thomas Meers had in some Mortgages inserted a Covenant, That if the Interest was not paid punctually at the Day, it should from that Time, and so from Time to Time, be turned into Principal, and bear Interest: Upon a Bill filed, the Lord Chancellor relieved the Mortgagors against this Covenant, as unjust and oppressive. So likewise is the Case of *Broadway*, which was first heard at the Rolls, and then affirm'd by the Lord King, an express Authority, that in Matters within the Jurisdiction of this Court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The Reason is; because all those Cases carry somewhat of Fraud with them. I do not mean such a Fraud as is properly Deceit; but such Proceedings as lay a particular Burden or Hardship upon any Man: It being the Business of this Court to relieve against all Offences against the Law of Nature and Reason: And if it be so in Cases which, strictly speaking, may be called legal, how much more shall it be so, where the Covenant or Agreement is against an express Law (as in this Case) against the Statute of Usury, though the Party may have submitted for a Time to the Terms imposed on him? The Payment of the Money will not alter the Case in a Court of Equity; for, it ought not to have been paid: And the Maxim of

Volenti non fit Injuria will hold as well in all Cases of hard Bargains, against which the Court relieves, as in this. It is only the Corruption of the Person making such Bargains that is to be considered: It is that only which the *Statute* has in View; and 'tis that only which intitles the Party oppressed to Relief. This answers the Objection that was made by the Defendant's Counsel, of the Bankrupts being *Participes Criminis*; for, they are oppressed, and their Necessities obliged them to submit to those Terms. Nor can it be said in any Case of Oppression, that the Party oppressed is *Particeps Criminis*; since it is that very Hardship which he labours under, and which is imposed on him by another, that makes the Crime. The Case of Gamesters, to which this has been compared, is no way parallel; for, there both Parties are Criminal: And if two Persons will sit down, and endeavour to ruin one another, and one pays the Money, if after Payment he cannot recover it at Law, I do not see that a Court of Equity has anything to do but to stand *Neuter*; there being in that Case no Oppression upon one Party, as there is in this.¹ Another Difficulty was made as to the Refunding: But is not that a common Direction in all Cases where Securities are sought to be redeemed, that if the Party has been over-paid, he shall refund? Must he keep Money that he has no Right to, merely because he got it into his Hands? I do not determine how it would be if all the Securities were delivered up; that is not now before me: I only determine what is now before the Court; and is the common Direction in all Cases where Securities are sought to be redeemed.

And so affirmed the Decree, &c.

STAT. 9 ANNE, c. 14.—*An act for the better preventing excessive and deceitful gaming.*—Whereas the laws now in force for preventing the mischiefs which may happen by gaming, hath not been found sufficient for that purpose; therefore for the further preventing of all excessive and deceitful gaming, be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, That

¹ In cases where agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is, perhaps, *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party. (Story, Eq. § 208.)—Per English, Ch. J., in *Broadhead v. Rogers*, 32 Ark. 758 (1878).

from and after the first day of *May*, one thousand seven hundred and eleven, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entred into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting, as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting, as aforesaid, or that shall, during such play, so play or bett, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in any wise notwithstanding; and that where such mortgages, securities, or other conveyances, shall be of lands, tenements, or hereditaments, or shall be such as incumber or affect the same, such mortgages, securities, or other conveyances, shall enure and be to and for the sole use and benefit of, and shall devolve upon such person or persons as should or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so incumbring the same, had been naturally dead, and as if such mortgages, securities, or other conveyances, had been made to such person or persons so to be entitled after the decease of the person or persons so incumbring the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments, from coming to or devolving upon such person or persons hereby intended to enjoy the same, as aforesaid, shall be deemed fraudulent and void, and of none effect, to all intents and purposes whatsoever.

FANNING v. DUNHAM.

COURT OF CHANCERY OF NEW YORK, 1821.

(5 *Johns. Ch.* 122.)

The bill, filed August 2, 1813, stated, that on the 26th of October, 1811, the plaintiff and defendant, who had dealings together in the exchange of promissory notes, &c., entered into a written agreement, which recited that the defendant had advanced to the plaintiff, at sundry times, his promissory notes in exchange,

amounting to 188,464 dollars and 88 cents, and for which the defendant was entitled to a commission of *two and an half per cent.*, and a further advance of 20,000 dollars, in exchange of notes, was agreed upon, in four notes, payable in 2, 3, 4, and 5 months, with the privilege of one renewal; and also, the further advance of 25,000 dollars, in the notes of the defendant, payable at 6, 7, 8, and 9 months, with notes of the plaintiff in exchange, subject to a commission of two and an half per cent., as well as the said renewals; and thereupon the plaintiff, in consideration of the above advantages, assigned to the defendant all his right to the ship Bordeaux and cargo, the ship Tea Plant and cargo, and the schooner Brothers and her cargo, which three vessels were then on foreign voyages, and it was agreed that the plaintiff's interest in the said vessels and cargoes should be sold by the defendant at auction, on their arrival; and if the commissions of two and an half per cent. on the said sums, should be equal in amount to the several sums above stated, then no other charge, more than the defendant's interest at seven per cent., and all necessary charges, as auction duty, storage, &c., should be made to the defendant; but if the goods did not amount to that sum, or not arriving, then the plaintiff guaranteed to the defendant his full commissions on any deficiency that should so occur; and the defendant was to have full power to take possession of the interest of the plaintiff on the arrival of the vessels, and to dispose of the same or hold it, at his discretion, accounting to the plaintiff for the surplus, first deducting his own demand, due by that or any former agreement.

That in the spring and summer of 1812, the plaintiff, finding it necessary to raise money, applied to the defendant, who, from time to time, advanced the plaintiff his notes, in exchange for the plaintiff's notes, and his endorsements on the plaintiff's notes, amounting to 103,678 dollars and 16 cents. And it was agreed between them, that the plaintiff should pay to the defendant a commission of two and an half per cent. on the amount of all such notes and endorsements; viz., the plaintiff was to put into the hands of the defendant (an auctioneer), goods to be sold at auction by the defendant, and out of the proceeds he was to retain the commission of two and an half per cent. on the amount of all such notes and endorsements by him advanced, over and above the usual commissions, expenses, and charges, upon such sales made at auction, if such proceeds on sales should be sufficient for the purpose; and if not, the balance or deficiency should be made up and paid by the plaintiff to the defendant. That as a condition of this last agreement, the plaintiff, upon receiving the notes and endorsements of the defendant, always gave his own notes to the defendant, in exchange for the amount of his notes and endorse-

ments, payable respectively, in each instance, one day before the day on which the notes of the defendant, or the notes of the plaintiff, endorsed by him, were payable.

That on the 9th of March, 1812, to secure to the defendant payment of his notes and endorsements and his commission thereon, the plaintiff assigned to him one hundred shares in the West Chester Manufacturing Society; and on the 27th of April, 1812, for the same purpose, the plaintiff gave to the defendant a bond conditioned to pay 100,000 dollars, with a warrant of attorney to confess judgment thereon; but no judgment was to be entered, until there was a default of the notes or endorsements; and on the 12th of May, 1812, the plaintiff, for the same purpose, gave to the defendant another bond conditioned to pay 30,000 dollars, and also a mortgage by him and his wife on lands at New Rochelle and Pelham, in the county of West Chester.

That on the 27th of August, 1812, the defendant gave to the plaintiff a declaration or deed of trust, reciting that the plaintiff was indebted to him in the sum of 43,818 dollars and 30 cents, in promissory notes therein specified, and for securing the amount of those notes, and such other moneys as the plaintiff owed, or might owe to him by the renewal of the said notes, or otherwise, the defendant held the said bond and mortgage, the one hundred manufacturing shares, the ship called the Zephyr, one-third of the ship Tea Plant, and the said bond and warrant of attorney; and that when the notes and other moneys were paid the bond and mortgage should be cancelled, and the other property given up or re-assigned to the plaintiff. To this deed was annexed a schedule of the notes. That the last mentioned writing was given in lieu of, or as a substitute for, the agreement of the 26th of October, 1811. The bill set forth the exchange of several notes between the parties, and that the plaintiff gave the defendant a note for 229 dollars and 47 cents, with an endorser, for the commissions, or premium thereon. It then set forth other exchanges of notes, and that the defendant's notes were less than the plaintiff's, by the amount of the commission of two and an half per cent. That other exchanges of notes took place; and that on the 21st of August, 1812, the plaintiff gave to the defendant six promissory notes, with an endorser, amounting to 6898 dollars and 20 cents, all of which were exclusively given for premiums or commissions on the exchanges of notes, as stated in the bill, that sum being the balance, after crediting the amount of sales of the goods of the plaintiff at auction. That several of the notes mentioned in the schedule, besides one of the *premium* notes for 1149 dollars and 70 cents, were paid by the plaintiff, when they fell due. The bill charged that the defendant had no other notes or demands against the plaintiff, but

such as were specified in the schedule, taking out such as were before specified as paid; and that all the notes remaining unpaid were *usurious* and *void in law*; and that the bond and warrant of attorney, the bond and mortgage, the assignments of ships and shares held as security for the payment of those notes, were also void in law. That on the 18th of December, 1813, before any of the notes became due and remained unpaid, the defendant fraudulently entered up a judgment on the said bond and warrant of attorney, in the Supreme Court, and issued an execution thereon to the sheriff of the city of New York, with a direction thereon endorsed, to levy 37,505 dollars of debt, and the costs. That in January term, 1813, of the Supreme Court, the plaintiff applied to that Court, who ordered the execution to be set aside, and awarded a feigned issue between the parties, to try whether the bond and warrant of attorney, and the notes for which they were given as collateral security, were not founded on usurious contracts or considerations. That the plaintiff caused the feigned issue to be made up, and gave notice of the trial thereof at the Kings Circuit, in June, 1813, but the trial was put off by the defendant. That the defendant, in February, 1813, fraudulently advertised the mortgaged premises for sale at auction, by virtue of the power contained in the mortgage. That he also advertised and sold at auction, one-third of the ship Tea Plant, so assigned as security, and fraudulently and by force dispossessed the plaintiff. The bill prayed for an injunction against the defendant from proceeding at law on the mortgage, or selling under it, and from sending the Tea Plant to sea, assigning the notes and other securities, &c., &c., and for general relief.

The feigned issue having been tried, and a verdict found for the plaintiff, he filed a *supplemental* bill, on the 5th of April, 1819, stating the substance of the original bill, and that after the feigned issue was made, but before it was tried, this Court, on the 7th of December, 1813, ordered the injunction, so far as it prohibited the defendant from selling the mortgaged premises, to be dissolved, unless the plaintiff should, within eight days, bring the money due on the mortgage into Court; and that on the 16th of December, 1813, the plaintiff appealed from that order, to the Court for the Correction of Errors; but it was, afterwards, agreed between the parties, that proceedings on the appeal should be suspended until after a decision on the feigned issue. That the feigned issue was settled, under the directions of the Supreme Court, and the pleadings were set forth in the bill, at length. That the feigned issue was tried before Mr. Chief Justice Thompson, at the sittings, in June, 1815, when the jury found all the issues in favor of the plaintiff; and the bill set out the *postea*, at length, by which it appeared that the jury found that the said bond and warrant of

attorney were made and executed upon an usurious consideration: that the said bond and warrant were made as collateral security, for certain promissory notes made by the plaintiff to the defendant, upon usurious considerations, or upon other engagements and transactions between the parties upon usurious considerations, and that the said promissory notes, for which the bond and warrant of attorney were given as collateral security, were respectively made and delivered upon usurious considerations. That to maintain the feigned issue, the plaintiff gave in evidence the bond and warrant of attorney, the judgment entered thereon, the instrument executed by the defendant, August 27th, 1812, and the schedule (A.) thereto annexed, the answer of the defendant to the original bill, and the cross examination of the defendant's witnesses. That after the verdict, the defendant made a *case*, on which to move for a new trial of the feigned issue; that a motion for a new trial was accordingly made and argued in October term, 1817, and that Court, in January term following, unanimously refused to grant a new trial. That before the *case* was settled, an agreement, dated 7th of May, 1816, was entered into between the counsel of the parties respectively, that the defendant might have a bill of exceptions prepared and signed and sealed, in the same manner, as if it had been tendered at the trial of the feigned issue, to the end that a writ of error might be brought, if either party thought proper, and that the decision which should be pronounced on such bill of exceptions, should be final and conclusive upon all matters put at issue by such feigned issue between the parties. That although the Supreme Court decided against the defendant, he never thought proper to take a bill of exceptions under the said agreement, and bring a writ of error; but has expressly declined doing so. That the writing of the 27th of August, 1812, and the schedule A. annexed thereto, and the bond and warrant of attorney, are the same as are set forth in the original bill. That according to the agreement of the 7th of May, 1816, the verdict and judgment on the feigned issue, as no writ of error has been brought, conclusively establish the fact, that the said promissory notes and other securities, held by the defendant, are usurious and void; notwithstanding which the defendant still holds the notes and securities, and refuses to give them up, but declares his determination to enforce the payment of the moneys for which the notes, &c., were given. That on the 31st of October, 1818, the Supreme Court, by an order, rescinded the order for a feigned issue, and all proceedings thereon, and directed all further proceedings on the judgment against the plaintiffs to be stayed, until the further order of the Court. That in January, 1819, the Supreme Court allowed the defendant to take out execution on the judgment.

That the appeal from the order to dissolve the injunction had been dismissed for want of prosecution. The supplemental bill prayed a similar injunction to the one originally granted, &c., and for general relief, &c.¹

December 1, 1820.—The cause was this day brought to a hearing on the pleadings and proofs.

Riggs and Wells for the plaintiff.

T. A. Emmet for the defendant.

THE CHANCELLOR [KENT]. 1. The first and great point in this case is, whether the charge of a commission of two and a half per cent. uniformly made by the defendant, upon the advance or endorsement of negotiable notes to and for the plaintiff, was usurious.²

2. The next, and the more embarrassing point, is as to the nature and extent of the relief.

If the defendant was endeavoring to enforce any of his securities in this Court, and the present plaintiff had set up and made out the usury, by way of defense, the remedy would have been obvious. The securities would have been declared void, and ordered to be delivered up and cancelled. But the defendant has not resorted to this Court. He has caused a judgment to be entered up at law, upon the warrant of attorney given by the plaintiff; and the Supreme Court have ultimately refused to afford any relief to the plaintiff against that judgment, though that Court awarded a feigned issue, and had the usury in the bond upon which the judgment was entered, established by the verdict of a jury. The defendant has also proceeded to foreclose the mortgage, not by the aid of this Court, but by advertising under a power contained in the mortgage, and it is the present plaintiff who is compelled to come here and ask for relief, which he cannot obtain elsewhere, against the judgment at law and other legal securities infected with usury, by means of the original transactions and responsibilities which they were intended to cover.

The question now is, upon what terms he can have relief?

The feigned issue, which was awarded by the Supreme Court, upon the judgment in this case, was granted while I had the honor to preside in that Court; and that course was then understood to be the practice of the Court, when a judgment entered by confession was alleged to be affected with usury. And I should have supposed, that if the usury had been found by the jury (as it was in that case, and upon the evidence now before me), that the Court would have administered the same equitable relief that is usually

¹ The statement of facts has been abbreviated.

² The discussion of this point is omitted. The learned chancellor reaches the conclusion that the charge was usurious.

granted here, or else have vacated the warrant of attorney, and set aside the judgment, and allowed the party to come in and plead the usury. But from the subsequent proceedings, I am led to infer, that the practice on this subject has been changed since I left that Court, and that all summary interference at law, with judgments upon confession, charged with usury, is now denied.

The history of the practice of the Courts of law, shows the embarrassments attending the subject, and the difficulty of applying a legal remedy, consistently with the rules of law. . . .¹

With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim available, and the defendant sets up and establishes the charge of usury, the Court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever, infected with usury. It is perfectly immaterial, in respect to the application of the principle to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his defense at law as well as he can. The case of *Taylor v. Bell*, 2 Vern. 171, is a striking but very harsh illustration of the rule. The plaintiff had given bonds with sureties for moneys borrowed at usury, and a warrant to confess judgment, and judgment was entered thereon. He then brought his bill to be relieved and for an account, and though the answer confessed the facts from which the usury was deduced, relief was denied and he was ordered to pay principal, interest, and costs. So, in a late case in the Exchequer (*Skyrne v. Rybot*, cited in Orde on Usury, 113), where a bond and warrant of attorney was taken in an usurious transaction, the decree was, to take an account of the money really paid, and that on payment thereof the bond and warrant of attorney were to be delivered up. In *Scott v. Nesbit*, 2 Bro. 641, 2 Cox, 183, we have this strong observation of Lord Thurlow: "I take it to be an universal rule," he observes, "that if it be necessary for you to come into this Court to displace a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any other

¹ The exhaustive examination of the practice of the law courts is omitted.

terms." He directed, in that case, that the judgment should stand as a security for the money actually paid, with legal interest.

The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court. Lord Hardwicke, 1 Vesey, 320, said that in case of usury equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due. Lord Eldon, 3 Ves. & Bea. 14, after an interval of more than sixty years, declared precisely the same rule. At law, says he, you must make out the charge of usury, and at equity you cannot come for relief without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party. In *Eagleson v. Shotwell*, 1 Johns. Ch. Rep. 536, the same rule was followed in this Court, where a party came to be relieved against usury in a mortgage.

I have been thus particular in showing the rule of equity on this subject, because the plaintiff has sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void, and ordered to be cancelled, without offering to pay anything. His counsel have also contended, at the hearing, that the rule in equity, where the defendant either confesses the usury or it is established by testimony, is the same as it is when usury is set up as a defense to a demand in law or equity. All that I can do in this case, consistently with my view of the established doctrine of the Court, is to direct an account to be taken of the dealings between the parties, and to hold the securities which the defendant has taken to be good only for the balance which may appear to be due to the defendant, after deducting all usurious excess in any of his commissions and charges.

The objection that presses upon the subject is that the statute of usury may be, in a great degree, eluded, by taking a judgment bond, which precludes the debtor from an opportunity of pleading the usury in a court of law; and if he can only be relieved upon the principles of a Court of Equity, or by the summary powers of a Court of law, acting upon equitable principles, the usurious creditor is sure to preserve his principal sum and the lawful interest. But this objection was for a long time perceived and felt and endured in the Courts of law, before any remedy could be applied, and though they interfered, at first, most effectually, by vacating the warrant of attorney, and allowing the party to come in and plead, they seem now to have abandoned the case to equitable relief, and to choose to administer no other. It is the folly of the party to have precluded himself from pleading by confessing judg-

ment. *Leges vigilantibus non dormientibus subveniunt.* At any rate, though it were even to be regretted that Courts of law cannot place the debtor in a condition to be enabled to annul the contract altogether, under the sanction of the statute; yet certainly I should introduce a new principle into this Court, if I was now to undertake to displace a judgment at law, upon any other terms than those I have mentioned.

The same objection and difficulty occur in the case of a mortgage taken to secure an usurious loan, with a power to sell annexed to it, by means of which the creditor forecloses his mortgage by an act *in pais*, without calling upon any Court to assist him. The debtor has no relief in that case, but by applying to this Court, and then he must comply with the terms of paying what was actually advanced. He deprives himself, in that case, by the power to sell, as he does in the other by his warrant of attorney to confess judgment, of an opportunity to appear in the character of defendant and plead the usury. These are cases in which the party by his own voluntary act deprives himself of his ability to inflict upon the creditor the loss of his entire debt. Many other cases may be stated in which the same result will follow. The party is in the same situation if instead of resisting the usurious claim he pays it. He cannot then expect assistance to recover back more than the usurious excess. If the warrant of attorney, or the power to sell were procured by fraud, or surprise, or accident, that would form a distinct head of relief, and in no wise applicable to the case. And, perhaps, it is sufficient for the purposes of public justice and public policy, that the law has enabled a debtor in every case in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his obligation to pay even what was received, and that in all cases he can, by paying the actual principal received and the lawful interest, be relieved from the usurious exaction.

The following decree was entered: "It is declared that the promissory notes given by the plaintiff to the defendant, and specified in the writing in the pleadings mentioned, of the 27th of August, 1812, and in schedule A. to the said writing annexed, and which remain unpaid, are infected with usury, and that the practice stated in the pleadings of asking and receiving a commission of two and a half per cent. upon the exchange of notes between the parties, or upon negotiable paper endorsed by the defendant, was usurious in every instance in which such commission exceeded the rate of seven dollars for the forbearance of 100 dollars for one year, or exceeded that rule, for a greater or less sum, for any other period; and that the pretence set up by the defendant, that the said commissions were taken for and on account of expected de-

posits of goods for sale at auction, was unfounded in point of fact. And it is further declared to be the established doctrine and practice of the Court, that the plaintiff who seeks the aid of the Court to set aside a judgment at law, or other legal security, on the ground of usury, cannot be entitled to relief, whether the usury be established by proof or admitted by the answer, except upon the terms of paying the principal and interest lawfully due thereon, after deducting every usurious excess; and that the judgment and the mortgage and the West Chester manufacturing stock, held by the defendant in this case, and mentioned in the pleadings, are to be deemed and taken as securities only for the balance that may be due after such deduction. It is thereupon ordered, &c., that it be referred to one of the masters of the Court to take and state an account of all the loans or endorsements of notes, or advances in cash by the defendant, to or on behalf of the plaintiff, and of all notes given by the plaintiff to him in exchange, or for commissions, or otherwise, and stated or referred to in the pleadings and proofs, from the commencement of their dealings as therein stated, and that on such accounting, the master in no case allow any commissions to the defendant beyond the lawful rate of interest declared as aforesaid; and that the defendant be charged with all excess of interest received by him, in the shape of commissions or otherwise, during the course of such dealings; and that he also credit the plaintiff with the amount for which his share or third part of the ship or vessel called the *Tea Plant* sold for, as admitted in the pleadings, and with all other payments made by the plaintiff and credited by the defendant, and that he report the balance, if any, remaining due to the defendant upon such accounting, and that interest be charged and allowed on such accounting, when the same would be proper, according to law and the usage of the Court. And it is further ordered, that the master report to the Court with all convenient speed, and that the question of costs and all further directions be, in the meantime, reserved.²¹

²¹ This represents the general view (*Heacock v. Swartwout*, 28 Ill. 291 (1862); *Sutphen v. Cushman*, 35 Ill. 186 [1864]). For the rule applied in cases where the mortgagor is defendant, see *Kuhner v. Butler*, 11 Ia. 419 (1860); *Union Bank v. Bell*, 14 Oh. St. 200 (1863); *Snyder v. Griswald*, 37 Ill. 216 (1865). Compare *Hunt v. Acre*, 28 Ala. (N. S.) 580 (1856).

WILLIAMS v. FITZHUGH.

COURT OF APPEALS OF NEW YORK, 1868.

(37 N. Y. 444.)

The plaintiff sought in this action a judgment declaring certain six notes (made by the plaintiff and given to the appellants' testator, two dated April 3, 1854, for \$5000 each, and four dated July 6, and July 1, 1854, for \$5000, \$6000, \$6000, \$4000, respectively), amounting in the aggregate to \$31,000, and a mortgage upon land in Ohio, given by the plaintiff to secure the payment of the six notes, void for usury, and adjudging and decreeing that they be given up, cancelled and discharged, and forbidding the prosecution of an action already commenced in one of the courts of Ohio, upon two of those notes, or any other action upon any of the said notes, or the said mortgage. The original defendant, Allen Ayrault, having died pending the action, the action was revived against the respondents, his executors.

The action was tried at Special Term in the Supreme Court, and to sustain the action the plaintiff produced a record of judgment which set forth the alleged transactions, in which the notes were given, and by which one of the notes dated in July was adjudged void for usury, and upon the evidence contained in the record the judge, at Special Term, found that all of the six notes were so void, and a judgment was rendered declaring the notes and the mortgage to be void for usury, and requiring that the respondents deliver up the notes and mortgage to the plaintiff to be cancelled, and execute a discharge of the mortgage in such form that it may be recorded in Ohio, so that it may be discharged of record and cease to be a lien upon the real estate described in it, and further enjoining the prosecution of an action (found to be pending) on some of the notes in one of the courts of Ohio, and awarding to the plaintiff his costs.

On appeal to the General Term, the Supreme Court modified the judgment so as to except from the operation thereof the two notes for \$5000 each, dated April 3, 1854, on the ground that the before-mentioned record did not necessarily decide that those two notes were usurious, and they adjudged that in all other respects the said judgment be affirmed. The executors (defendants below) appealed to this court.

Scott Lord for the appellants.

George F. Danforth for the respondent.

WOODRUFF, J. The principal question which was discussed on

this appeal, and which includes nearly all of the subordinate questions raised, is, will the courts of this State entertain a bill to declare void and compel the cancellation of a mortgage of lands lying in another State and executed there in pursuance of a contract entered into in this State to secure loans made and payable in this State, some of which loans are usurious and void by our laws?

This question may be intelligibly discussed by inquiring—first, would such a bill be entertained under the same circumstances if the lands were situated in this State? second, how is the question affected by the location of the lands without our jurisdiction? and, third, should the court require the surrender and discharge of such a mortgage without the payment of the loans which are not found to be usurious?

First, then, suppose the lands were situated in this State.

1st. It cannot be denied, indeed I do not understand the counsel for the appellant to question, that such a mortgage is void by the law of the State of New York. Our statute declares that “all . . . assurances, conveyances, all other contracts or securities . . . whereby there shall be reserved, or taken, or *secured*, or agreed to be reserved or taken,” any greater sum or value for the loan or forbearance of money, than at the rate of seven per cent. per annum, “shall be void.” The proposition is, that a security given to secure the payment of money is void if it be given to secure a usurious loan, and if it be so given, the fact that it was also given to secure loans which were not usurious, will not preserve it from entire condemnation. If void in part, it is void altogether.

The late learned Chief Justice Jones, in *The Fulton Bank v. Benedict* (1 Hall S. C. 480, 546), thus states the proposition: “It is well settled that if any part of the loan or debt for which the note or security was given is usurious, the security is void;” referring, among other cases, to *Harrison v. Harmel*, 5 Taunt. 780.

In *Jackson v. Packard*, 6 Wend. 415, it is held that a mortgage, given to secure a sum of money, consisting of one loan made prior thereto, which is usurious, and another which is free from usury, is void. “If a mortgage or other security is given for two or more antecedent loans, either of which was infected with usury, the whole security is void.” That under the statute “there is no such thing as such an instrument being void in part and good for the residue; the taint of usury destroys the whole security.” The debt which was free from usury may be recovered, but the mortgage is void (*Rice v. Welling*, 5 Wend. 595). And in *Hammond v. Hopping*, 13 Wend. 505, the same doctrine is re-asserted in reference to contracts generally. “The statute against usury renders any contract infected with it, utterly void; but if the usurious security was given in part for a pre-existing valid debt, that

debt is not destroyed by the illegal security." These decisions have stood as the law of this State for more than thirty years, and I am not aware that their correctness has been questioned in any of our courts.

2d. If, then, the mortgaged premises were in this State, have our courts jurisdiction to decree that the mortgage be given up and cancelled, and is it error, upon the facts assumed, to do so? The statute is:

"§ 13. Whenever any borrower of money . . . shall file a bill in chancery for *relief* or discovery against any violation of the provisions of . . . this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the sum or thing loaned, nor shall any court of chancery require or compel the payment . . . of the principal sum, or interest or any part thereof, as a condition of granting relief.

"§ 14. Whenever it shall satisfactorily appear, by the admission of the defendant, or by proof, that any . . . assurance, pledge, conveyance, contract, security . . . has been taken or received in violation of the provisions of this act, the Court of Chancery *shall declare the same to be void*, and enjoin any prosecution thereon, and *order the same to be surrendered and cancelled*."

This language, taken literally, seemed, not only to confer jurisdiction, but absolutely to require the Court of Chancery to decree the surrender and cancellation of securities infected with usury, of whatever description, whenever the borrower saw fit to invoke the interposition of the court, without the aid of any other ground for coming into that tribunal than the fact of usury. But the chancellor, in *Perrine v. Striker*, 7 Paige, 598, held, that where the party had a full and complete remedy at law, he could not come into the Court of Chancery for relief; that this statute was not intended "to compel the Court of Chancery to take jurisdiction of every question of usury, although a perfect remedy, both as to discovery and relief, could be had in a court of law." Hence, when the parties to a note not negotiable sought a discovery and perpetual injunction against a suit thereon (although the statute authorized the examination of the plaintiff in the suit at law on the trial) on the ground that it was usurious, the bill was dismissed because the remedy was complete at law. But he recognized the jurisdiction and the propriety of its exercise, when there were any special circumstances which made the remedy at law ineffectual or incomplete.

In *Morse v. Hovey*, 9 Paige, 197, on dismissing the bill, the chancellor affirms the decision in *Perrine v. Striker*, and expounds it more fully, thus: "The legislature did not intend to transfer to this court concurrent jurisdiction with courts of law in every case

of a usurious contract; but merely to give to this court the power to exercise its jurisdiction in those cases where it was necessary to aid the defense of usury; or to remove *usurious securities which were a cloud upon the complainant's title* to real property, or which might be used at law to his injury in such a manner that he could not interpose a legal defense to a suit on them in a court of law. Here the note is *negotiable*, so that it may be sued in the name of a third person; and if the bill had contained the allegation that the usury could only be proved by the oath of the defendant, it might possibly have presented a case for the interference of this court."

Conceding that this relaxation of the stringent and imperative language of the statute is reasonable, no construction of the statute has gone further.

Accordingly, bills by borrowers to remove usurious securities, which are a cloud upon the complainant's title to real property, have uniformly been entertained. (See *Cole v. Savage*, 10 Paige, 583, questioned, without impeaching the general doctrine, in *Post v. Bank of Utica*, 7 Hill, 391; *Peters v. Mortimer*, 4 Edw. Ch. 279; *Pearsall v. Kingsland*, 3 *id.* 195; *Dry-Dock Company v. American Life Insurance and Trust Company*, 3 Comst. 361; *Schermerhorn v. Talman*, 14 N. Y. 93; *Manice v. Dry-Dock Company*, 3 Edw. 143.)

It is no answer to such a bill that the mortgagor has a good defense to a bill for the foreclosure of the mortgage. It is an apparent incumbrance on the land. Its invalidity depends upon extrinsic facts. The doctrine of *Cox v. Clift*, 2 N. Y. 123, cited by the appellant, that the complainant has a perfect legal defense against it (when a right under it is asserted), "written down in the title-deed," has no application to it; and *Ward v. Dewey*, 16 N. Y. 519, was decided on like grounds. The mortgage is an impediment to a sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure, not only for these reasons, but because in the meantime it may become impossible to prove his defense. If this be so, then, if the lands mortgaged were situated in this State, the mortgage in question was wholly void, and there is sufficient ground for invoking the interposition of the court to decree that such a mortgage be surrendered and cancelled or discharged. Whether it should be so discharged without the payment of that portion of the debt which has not been adjudged to be usurious, and which, for the purposes of this appeal, is to be deemed both legally and equitably due, will be presently considered.

Second, how, then, is the question affected by the circumstance that the mortgaged premises are situated in the State of Ohio, where the mortgage was executed?

The mere circumstance that the land is in another State can,

upon no principle that I can discover, furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise.¹

Third, does it follow that the decree in this action, so far as it directed the surrender and discharge of the mortgage, was warranted by well-established rules of equity applicable to the subject?

It is familiar doctrine in courts of equity that "he who seeks equity must do equity," and without that the court of equity will not extend its arm for the relief of the suitor. If he can protect himself, either in whole or in part at law, if he can defend when assailed, very well; he can decline any concession of the equitable rights of the adverse claimant and stand upon his legal position, it may be safe, or it may be in peril, but if he invoke equitable interposition he must come with clean hands and prepared to do whatever in the judgment of equity is fair and equitable to his adversary; else, the court will not entertain him, but will answer, "Stand upon your legal rights, or come here and perform the just condition of equitable relief."

It cannot be doubted, therefore, that when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever it is equitable that he should do, before the court will interfere. In that respect he stands in no other or better condition than he who comes to compel the specific performance of a contract to convey: he must come prepared to pay and perform all that by the conditions of the contract he was bound to pay or perform,—or than he who comes to set aside a conveyance obtained from him by fraud: he must come prepared to restore all that he has received as the consideration of such conveyance.

And, on precisely the same ground, it was the well-settled rule of courts of equity that he who came into that court to set aside a conveyance or other security as void, because given to secure a usurious loan, must come prepared to pay so much as he had in fact received. He might stand on his legal rights and defend any and every endeavor to compel him to pay, but if he invoked the aid of a court of equity to give him affirmative relief that court recognized his equitable obligation to refund what he had received (*Rogers v. Rathbun*, 1 Johns. Ch. 367; *Tupper v. Powell*, *id.* 439; *Fanning v. Dunham*, 5 *id.* 122, 137; *Morgan v. Schermerhorn*, 1 Paige, 544; *Fulton Bank v. Beach*, *id.* 429; *s. c.*, 3 Wend. 573; *Taylor et ux. v. Bell et al.*, 2 Vern. 170; *Whitman v. Francis*, 8 Price, 616).

On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition?

¹ The discussion of this point is omitted.

The notes which he had given to secure a usurious debt are declared void, and ordered given up to be cancelled. He cannot be prosecuted upon his mortgage in any form in this State, because by law it is void. If he has need of further equitable interference, it is because the mortgage is an apparent lien, a cloud upon the title to his lands, and he should be relieved therefrom.

Why, then, if he asks further equitable relief, and invokes the further interposition of a court of equity therefor, should he not do equity? Why should he not pay to the defendants what he in fact received?

The answer, and the only answer which is or can be suggested, is that our statute declares (Laws of 1837, c. 430, § 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the Statutes, concerning the interest of money, "or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal on the sum or thing loaned*, nor shall any court of chancery require or compel the payment or deposit of *the principal sum or interest*, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or this act." This section of the act of 1837 was passed to extend the previous title, so that it should embrace cases in which the court was applied to for discovery, as well as cases in which relief alone was sought, and to relieve him from paying any part of the principal or interest in either case, and it should therefore be read and construed in connection with such previous law, which is as follows (1 Rev. Stat., p. 772, § 8): "Whenever any borrower of any money, goods or things in action, shall file a bill in chancery for a discovery of *the money, goods or things in action taken or received in violation of either of the foregoing provisions*, it shall not be necessary for him to pay, or offer to pay, any *interest* whatever *on the sum or thing loaned*, nor shall any court of equity require or compel the payment or deposit of *the principal* or any part thereof, as a condition of granting relief to the borrower in any case of a usurious loan, forbidden by this chapter." (See *Livingston v. Harris*, 3 Paige, 528; same case on appeal, 11 Wend. 324; see the history of this legislation in *Post v. Bank of Utica*, 2 Comst. 391, *et seq.*)

What in these statutes is the principal sum or interest which the borrower shall not be required to pay? Is it not the "usurious loan" and the interest thereon? Is it not *the* money, goods or things in action, taken or received in violation of the provisions of the act? Most clearly that, and only that. It does not contemplate, it is true, the existence of any other equitable condition,

but it by no means requires that any other condition should be waived.

The subject dealt with is a loan upon usury; it designs that there shall be no means, direct or indirect, in which the payment of such a loan, or any interest thereon, shall be compelled either by a court of law or equity. And relief against such payment accomplishes the end, so far as this statute directs relief to be given.

Hence the discovery spoken of, and authorized by the statute, is a discovery of *the money*, etc., taken or *received* in violation of the statute, and not money which, not being so received, the borrower is bound both at law and equity to repay. And it is *the principal* or interest on *the* sum loaned, i. e., loaned in violation of the statute, the payment of which cannot be required as a condition of relief.

It follows that where a contract or obligation is given for two or more separate and independent things or objects, having no connection with each other, and one of those objects is the security of a usurious debt, although the contract or obligation is altogether void for reasons above given, and no action at law or elsewhere could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief, is to forbid that any payment on account of such debt shall be made a condition of relief. As to other conditions, the statute is silent, and the court is left to administer relief upon those principles which govern the subject generally.

When, therefore, the plaintiff asks that a mortgage be cancelled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or any interest thereon, but it may require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question.

In equity, the mortgagor in such case stands, in reference to debts not usurious secured by the mortgage, in the same attitude as a complainant seeking to redeem. He must pay what at law and in equity he owes. Nor is this any departure from the doctrine already stated, that the mortgage, being void in part, because given to secure a usurious debt, is void altogether.

Upon that doctrine, the plaintiff, if he see fit, may rely, and on that ground he may, if he can, defend himself and the title to his lands whenever and wherever assailed, but if he asks affirmative action and interference from a court of equity to set aside the mortgage and adjudge its surrender, he must do equity by paying his just debt, not impeached for usury.

The most that the court below should have done, was to adjudge that so much of the apparent debt as was secured by the four notes dated in July, 1854, proved and adjudged (by the decree as modified by the General Term of the Supreme Court) to be usurious, was void; that the said notes be surrendered to be cancelled, and that the defendants be enjoined against the prosecution of any suit upon those four notes.

The judgment should be modified to conform to these views without costs to either party on the appeal, and the judgment rendered at the Special Term, so far as it adjudged or decreed the surrender or discharge of the mortgage should be reversed, and so far as it awarded costs to the plaintiff, should be further reversed and modified so that neither party recover costs of the other in this action.

All the judges concurring,

Judgment affirmed, with modification.

RAGUET v. ROLL.

SUPREME COURT OF OHIO, 1836.

(7 *Ohio Rep.* 70 [429].)

This was an action of ejectment for a lot of land in the city of Cincinnati. On the trial, the plaintiff gave in evidence two mortgages executed by the defendant to him, for the same lot, one dated 16th October, 1826, the other the 20th October of the same year; each to secure the payment of 500 dollars. The defendant, on his part, adduced evidence to show that these deeds of mortgage were given to secure the payment of 1000 dollars, in consideration of the plaintiff's agreeing not to prosecute the son of the defendant for a theft, with which he had charged him.

GRIMKE, J. delivered the opinion of the court.

This was an ejectment on a mortgage executed by the defendant to the lessor of the plaintiff, conditioned for the payment of five hundred dollars. The defense was, that although this was the consideration expressed in the deed, yet, that the real consideration was an agreement on the part of the plaintiff not to prosecute the son of the defendant for a theft, and that the mortgage was given to secure the payment of one thousand dollars, as a reward for that purpose. In *Raguet v. Roll, ante*, p. 269, which was a *scire facias* on the same mortgage, it was held that this defense might be set up for the purpose of avoiding the payment of the money; and it is

now supposed that it will be equally effectual in bar of the action of ejectment. In the act under which the *scire facias* was instituted, it is provided that the defendant may plead any plea which would be good in avoidance of the land or money; so that the principles decided in the former case do not necessarily furnish a governing rule for the determination of this. The distinction between an executed and executory contract, where the consideration is unlawful, is a very plain one. In the former case, the Court will not annul; in the latter, they will not enforce. And this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act. As long as the agreement continues executory, there is an incentive to the commission of the deed; but when it is executed, no further motive of this kind exists, since the estate has already vested or the money actually been paid. It may be supposed, however, that although a deed operates an actual transfer of the title to land, yet, if it is necessary to institute an action in order to recover possession, the Court will not enforce the right of recovery; in other words, that the principle *in pari delicto, etc.*, comes in conflict with the other principle to which I have referred, and that it necessarily affords the governing rule of determination. Where two apparently opposite principles have been established, the presumption is that they are both intended to have effect, and that the one shall not annul or neutralize the operation of the other. The rule *in pari delicto, etc.*, then, will be found to be universally applicable to executory agreements only. Thus in *Hawes v. Leader*, Cro. Jac. 270, the intestate of the defendant granted by deed to the plaintiff all his goods; the real purpose was to defraud creditors; the grantee brought an action to recover them, and obtained judgment. So in *Starke's Ex. v. Littlepage*, 4 Randolph, 368, which was an action of detinue to recover personal property transferred by a fraudulent bill of sale by the defendant to the plaintiff's intestate, the contract was enforced, and the plaintiff recovered. The rule, then, does not apply when the policy of the law requires that a fraudulent or vicious conveyance should be enforced; and such is declared to be the law by Coke, in his "Commentary on Littleton," and by Powell, in his "Treatise on Contracts." But there are exceptions to the rule *in pari delicto, etc.*, even in its application to executory agreements. *Watts v. Brooks*, 3 Ves. 612, is an instance of this, where the plaintiff and defendant, having entered into a contract to be jointly concerned in ship insurances, in violation of the Stat. 6 G. 1st, although the Court would not execute the contract, it would not exclude the result of it in decreeing a general account. And in *Osborne v. Williams*, 18 Ves. 379, the exception was pushed still farther; it was held that the rule, "*in pari delicto melior est conditio possidentis*," "preventing

suit," is not universal; and a direct decree was made in favor of the plaintiff, although the agreement was a fraud on the post-office.

If the deed in this instance were an absolute conveyance, there could be no doubt, then, of the right of the plaintiff to recover. The real difficulty arises out of the double character of the instrument, which is evidence of a debt hereafter to be paid, and at the same time, operates an actual transfer of the land to the mortgagee. Although a strong disposition existed once to treat a mortgage as a mere chose in action, and although individual judges were heard to declare that the money was the principal, and the land only the incident, and that whatever would carry the money, would convey the land; yet such is not now supposed to be the law. A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable. And the case comes then within the principle that when a conveyance has actually been executed on an unlawful consideration, the Court will not merely not annul it, they will even permit it to be enforced. The cases put by elementary writers are all of them conveyances *on condition*. Thus, if a feoffment be made to one man, on condition that he shall kill another, it is said to be good and unavoidable. But in the case of a mortgage, it may be said that there are two conditions, one to be performed by the grantor, the other by the grantee; the former is to pay the one thousand dollars, the latter is to suppress a criminal prosecution. This is the apparent, but it is not the real nature of the transaction; and it is in consequence of this false appearance, that the question seems to be surrounded with an unusual degree of difficulty. A mortgage is in reality an actual payment of the debt, as well as an actual transfer of the land; although, in consequence of the land being sometimes greater in value than the debt, an *equity* was supposed to arise in favor of the mortgagor, which was called his right of redemption, and which is now extended to every case of a conveyance by way of mortgage. It is a mere equity, then, an equity which is not recognized by a court of law, but only by a court of chancery; an equity which, proceeding on the ground that the debt has already been paid in one way, enables the grantor, on certain terms, to pay it in another. There is, then, no real difficulty in the case, however intricate the questions presented may at first sight appear to be. The testimony offered to impeach the deed was improperly admitted, and there must therefore be a new trial.¹

¹ Compare *Williams v. Engelbrecht*, 37 Oh. St. 383 (1881), *accord*; *Pearce v. Wilson*, 111 Pa. St. 14 (1885), *contra*.

COWLES v. RAGUET.

SUPREME COURT OF OHIO, 1846.

(14 *Ohio Rep.* 38.)

This is a Bill in Chancery, reserved in Hamilton County, and comes before the Court by appeal from the Superior Court of Cincinnati.

The original bill was filed on the 17th of February, 1841, in which the complainant states that in the year 1839, he purchased a certain lot in Cincinnati, under a decree of said Superior Court, upon a bill by him filed, to foreclose a mortgage on the same lot, executed by Peter Roll, one of the defendants, in 1835. That the money by him bid for said lot exceeded, by about fifteen hundred dollars, the amount of the decree. That this surplus is claimed by Roll the mortgagor, by the defendant McMicken, in consequence of an assignment to him of an older mortgage on the same land, given by Roll to the defendant Raguet, and by the other defendants claiming to be judgment creditors of Raguet, and, as such, to have a lien upon the land mortgaged.

The prayer of the bill is, that the defendants may be compelled to interplead; and in the event that the court shall be of opinion that the mortgage of Raguet is a lien upon the land, then that the complainant may be permitted to redeem.

The facts of the case as they appear from the bill, answers, exhibits and testimony, are substantially these: In the summer of 1826, the defendant made to Raguet two promissory notes for five hundred dollars each, and, to secure the payment, executed two mortgages on the premises in controversy. The consideration for these notes is said to have been, in part at least, an engagement, on the part of Raguet, not to prosecute the son of Roll, who had been by him accused of larceny.

On the 27th of November, 1832, Raguet, being in failing circumstances, made a general assignment to the defendant McMicken, for the use and benefit of his creditors. In this assignment was included choses in action, as well as all mortgages or judgments, and the "claim against Peter Roll," then in controversy.

Afterwards Raguet commenced an action of ejectment for the lot in controversy, upon his mortgage, and at the December term of this Court, 1836, a judgment was rendered in his favor. McMicken as the assignee of Raguet, subsequently obtained possession of a portion of the mortgaged premises, and enjoyed the same for some twelve or eighteen months, or more.

The defendants Wood and Abbot, at the February term of the Court of Common Pleas of Hamilton County, 1833, recovered a judgment against Raguet, which was levied upon the interest of Raguet in the mortgaged premises on the 24th of April, 1840.

The defendants, Brown, Chase and Company, recovered a like judgment against Raguet at the August term of the same Court, 1833, and took out execution, which was levied on the same interest, on the 27th of April, 1840.

In 1835, Roll executed a mortgage on the same premises to the complainant Cowles, which was subsequently foreclosed, and the premises sold as stated in the bill.

In February, 1841, the property was also sold on a *vendit*, issued upon the judgment of Brown, Chase & Co., and sale confirmed.

HITCHCOCK, J. The facts and circumstances connected with this case are not new to the Court, at least those which may be considered as the leading ones. They have been repeatedly presented to us, have been as often passed upon, but the controversy does not as yet seem to have been closed.

Before proceeding to the consideration of the particular questions arising in this case, it may be well to ascertain what has been the previous action of the Court. Previous to the December term, 1831, Raguet commenced a suit against Roll, upon the notes secured by the mortgage, referred to in the statement of the case. This suit was commenced in the Court of Common Pleas of Hamilton County. The defendant pleaded in bar, that before and at the time of the commencement, Charles Roll, the son of the defendant, was suspected and accused by Raguet of having stolen his goods and chattels in Cincinnati; that Raguet was about to institute a criminal prosecution against Charles, for the theft, and that the consideration for which the note was given, was a promise or engagement on the part of Raguet that he would refrain and desist from instituting such criminal prosecution. To this plea there was a general demurrer. The Court of Common Pleas sustained the demurrer and rendered a judgment against Roll for the amount of the notes.

To reverse this judgment, a writ of error was sued out, and the case came on for hearing at the aforesaid December term of this Court, 1831. By the decision of the Court, the judgment of the Court of Common Pleas was reversed, upon the principle that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them. If the agreement be executed, the Court will not rescind it; if executory, the Court will not aid in its execution. This case is reported at length, 5 Ohio Rep. 400.

Raguet then commenced a suit, by *scire facias*, upon the mort-

gage, under the law then in force, to enforce payment by the sale of the mortgaged premises. A plea substantially the same as that interposed in the action upon the notes, was filed; and, upon trial, the Jury found the facts as stated in the plea. A motion was made for a new trial, which the Court overruled, sustaining the decision in the former case (7 Ohio Rep. 76, 1).

Raguet then commenced an action of ejectment upon the mortgage, and this case came before this Court at the December term, 1836. Roll attempted to set up the same defense as in the former cases, but it was not allowed by the Court; the Court holding that a mortgage was not an executory, but an executed contract; and that, as the Court would not aid in carrying into effect a contract of the former character, so neither would it aid in avoiding or rescinding a contract of the latter character (7 Ohio Rep. 70, p. 2).

What then is the situation, at this time, of the original parties to this contract? The fee of the land is vested in Raguet or those claiming under him; and, by execution upon the judgment in ejectment, he may at any moment be put into the possession. This judgment cannot be enjoined, because, by ordering an injunction, the Court would be doing, indirectly, what it has refused to do directly. It would in effect amount to the rescission by a judicial tribunal of an executed contract, the consideration of which was against public policy, and which would be contrary to the opinion of the Court, as expressed in the case already cited from 4 Ohio Reports.

Now what is the case before the Court? The interest of Roll in the lot of ground, was transferred to the complainant by judicial sale in 1839. He has in his hands about fifteen hundred dollars, which belongs to Roll, unless the same is necessary to satisfy prior incumbrances. The complainant prays the Court, in the event the mortgage of Raguet is held to be an incumbrance upon the land, to allow him to redeem; and he prays further that the funds now in his hands may be applied to that purpose.

The Court have already decided, not only that the mortgage is an incumbrance, but have sustained an action of ejectment in favor of the mortgagee, for the recovery of the possession of the mortgaged premises; and, as already remarked, the mortgagee may, at any moment, through the instrumentality of the proper writ of execution, acquire the possession. The legal title is vested in the mortgagee; but the deed under which he claims, and by virtue of which the title is vested in him, is subject to a condition that the same shall be void, upon the payment of a certain sum of money by the mortgagor. Now there is nothing in this condition requiring of the mortgagor to perform an impossible, immoral, or illegal act. If such were the fact, the condition would be void and the

deed absolute. But it is not so. It is a simple condition for the payment of money.

But it may be said that the original consideration for the promise to pay this money was an illegal consideration. Be it so. Still the person to whom the promise was made, cannot be permitted to set this up to destroy the effect of a condition inserted in the deed, executed to secure the performance of that promise. When the mortgagee was prosecuting an ejectment upon his deed, we would not and did not permit the mortgagor to avoid that deed by proving that the consideration was illegal. And now, when the mortgagor comes to redeem, shall we permit the mortgagee to defeat that condition, by proving that the consideration for the promise set forth therein, was illegal? This would not seem to comport with even-handed justice. It would have been honest in Roll to have performed this condition by the payment of the money. It would be honest in the complainant to pay it; and we think he has a right to do it, and thereby redeem the land from the effect of the mortgage.

But, in this case, the mortgagee does not object to the redemption. The objection comes, so far as there is any, from the mortgagor himself. He claims to be discharged from the performance of the condition, and still to retain the land. He seeks to induce this Court to do, indirectly, what it would not do directly. In this aspect of the case, it is nothing more nor less than an attempt to obtain an injunction against the judgment in ejectment. This cannot be done. The mortgagor has conveyed this land by a deed duly executed, subject nevertheless to a condition. If he would retain the land, he must perform that condition.

But it is insisted by the counsel of Roll, that, admitting the right of the complainant to redeem, still, that the surplus money in his hands cannot be applied to this object, because, as they say, he purchased the land subject to the mortgage of Raguet. The fact appears to be this: in the decree in the case of Cowles against Roll and others, under which the complainant purchased, the Court, although they ordered a sale, did not undertake to decide the validity of Raguet's mortgage. Of course that sale must be subject to this incumbrance. But still the land could not be, and was not sold for any less sum. The law required that it should be sold for at least two-thirds of the appraised value. It was so sold. The land itself for its full value; not the land reduced in price in consequence of Raguet's mortgage. Under these circumstances, it seems equitable to the Court that this surplus should be applied first to remove the incumbrance of the mortgage now in controversy. If anything remains, it must be paid to Roll.

The next question is, as to which of the defendants is entitled

to the money to be paid for the redemption of this mortgage. McMicken claims as the assignee of Raguet, by deed executed in 1832; Wood and Abbott, and Brown, Chase & Co., as judgment creditors of Raguet, under judgments rendered in 1833, and levied on his interest in the mortgage premises in 1840.

From a careful examination of the deed of assignment, we are clearly of opinion that the interest of Raguet, by that deed, was vested in McMicken; and such being the opinion of the Court, it is unnecessary to enquire as to the claims of the other defendants.

McQUADE v. ROSECRANS.

SUPREME COURT OF OHIO, 1881.

(36 *Oh. St.* 442.)

Error to the District Court of Scioto County.

The action below was brought by Sylvester H. Rosecrans against Elizabeth McQuade and John McQuade, administrator *de bonis non* of Hugh Reiley, to foreclose two mortgages executed by said Reiley and his wife Elizabeth, now the plaintiff Elizabeth McQuade, to secure the payment of certain promissory notes, amounting in the aggregate to \$1600, executed by Hugh Reiley and delivered to Emanuel Thinpoint, the defendant's testator, in the years 1857 and 1858. Said Elizabeth was sole heir of the said Hugh Reiley. The answer averred, among other things, that at the time said Hugh Reiley executed the said notes and mortgages, he was in embarrassed circumstances, and involved in debt beyond his means to pay, without resort to the real estate mortgaged, and that said mortgages were executed by said Reiley and received by said Thinpoint in double the amount actually loaned, for the purpose of placing the property mortgaged beyond the reach of the creditors of Reiley. The reply admitted that the consideration of said notes secured by said mortgages to the amount of \$800 was never paid to said Reiley by said Thinpoint, but was a trust fund created by said Reiley in favor of said Elizabeth, who after the death of said Hugh Reiley and before said suit was commenced, intermarried with John McQuade. The reply denied that said conveyances were made with intent to defraud the creditors of said Hugh Reiley. On the trial in the district court, to which the cause had been appealed, the plaintiffs in error called as a witness Cornelius McCoy, who stated that he was acquainted with Hugh Reiley in his lifetime, the former husband of the said Elizabeth McQuade, and coun-

sed for defendants therein propounded to the witness the following question, viz.:

"What, if anything, do you know as to the pecuniary circumstances of Hugh Reiley, prior to his death?"

To which question the plaintiff, by his counsel, objected, and the court sustained said objection, and the witness was not permitted to answer said question.

Counsel for defendants then proposed and offered to prove by said witness, and other witnesses, that at the time of the execution of said notes and mortgages sued upon, the same were given for just double the amount of money actually loaned. That the said Hugh Reiley was being sued by various creditors and was in embarrassed circumstances and wholly insolvent, which facts were well known to both said Hugh Reiley and the said Emanuel Thinpoint, and that the object on the part of both said Reiley and Thinpoint in taking the notes and mortgages for double the amount loaned, was to cover up and protect said real estate so mortgaged from being levied on and sold in payment of the debts due to said creditors; that, in fact, the giving and taking of the said notes and mortgages did operate as a fraud on said creditors; but the court ruled that said evidence and each part thereof was incompetent; that the contract, as between the said Emanuel Thinpoint and Hugh Reiley must be regarded as executed, and that the defendant, Elizabeth Reiley, was not in a position to raise the question of fraud upon the creditors of the said Hugh Reiley, and therefore excluded the testimony offered. Judgment having been given for the plaintiff below, the exclusion of said testimony is here assigned as error.

BOYNTON, C. J. We think the court erred in excluding the evidence offered to show that the object of the mortgagor in giving the mortgages sued on to secure double the amount of money borrowed, and of the mortgagee in receiving the same, was to defraud the creditors of the mortgagor. Section 97 of the crimes act (1 S. & C. 429) makes it a penal offense, punishable by fine and imprisonment, for any person to make any grant or conveyance, with intent to defraud his creditors of their just demands.

The object of the testimony offered and rejected was to show that a part of the consideration of each of the notes the mortgages were given to secure was illegal, and consequently that the mortgages were void. If a part of the consideration of each note was illegal, the effect would be the same as if the entire consideration were illegal, and such effect would be to render the mortgages void. If any distinct note that either mortgage was given in part to secure, was not tainted with the fraudulent purpose to defraud the maker's creditors, no doubt equity would follow the law and enforce to that

extent the mortgage security; but where a part of the consideration, whether large or small, is affected with the fraud, the case falls within the operation of the principle stated and affirmed in *Widoe v. Webb*, 20 Ohio St. 431. Hence, the testimony offered was clearly competent, unless the view is correct which the district court seems to have taken, namely, that the contract evidenced by the mortgages was fully executed between the parties. That such is not the character of the contract in the view of a court of equity, is apparent from a moment's reflection. In equity a mortgage is but a chose in action, given to secure the performance of some act, usually the payment of money.

Where anything remains to be done to carry into effect the intention of the parties, and which can only be accomplished through the aid of a court of equity where one of the parties refuses to perform the stipulation which he has agreed to perform, the contract is executory. A mortgage being conditioned for the payment of a sum of money, or the performance of some other act, if the money is not paid or the act performed, and the equity of redemption is sought to be foreclosed, the active aid of a court of equity is required. The payment of the mortgage debt, or the performance of the condition, whatever it may be, can be secured in no other way.

And this aid is always, and uniformly, denied, when sought to enforce a contract the consideration of which is illegal. In such case the maxim applies, *in pari delicto potior est conditio defendentis*, not because the defendant's rights are superior to the plaintiff's, but coming into court with unclean hands it refuses to exercise its powers in his behalf. The case of *Raguet v. Roll*, 7 Ohio, 77, was a *scire facias* on a mortgage to charge lands with execution. The mortgage was given to secure the payment of the sum of \$500, the consideration of an agreement to suppress and prevent a criminal prosecution. The relief sought was denied, and expressly upon the ground that the consideration of the mortgage was tainted with illegality. That case, in principle, is not distinguishable from this, and is decisive of the question now under discussion. The remaining point is, that because Mrs. McQuade signed the mortgages, she cannot allege that the consideration of the same was illegal either in whole or in part. This question was settled in *Goudy v. Gebhart*, 1 Ohio St. 262, and was also directly involved in *Raguet v. Roll*. The rule is, that in so far as the contract is executory, the defendant, although *in pari delicto*, or any one acquiring an interest in the property affected by the contract sought to be enforced, may set up the illegality of its consideration in defense. No one is allowed to set up his own fraud or criminality to defeat an innocent party, but where both parties

are *participes criminis*, the fraud may be set up and proved by either party, when the unexecuted portion of the contract is sought to be enforced against him.

Judgment reversed and cause remanded.

STILLMAN v. LOONEY.

SUPREME COURT OF TENNESSEE, 1866.

(3 *Cold.* 20.)

At the March Term, 1865, of the Common Law and Chancery Court at Memphis, plaintiff's bill was dismissed. Judge Smith, presiding. Complainant appealed.

SHACKELFORD, J., delivered the opinion of the Court.

This bill was filed on the Chancery side of the Common Law and Chancery Court at Memphis, to foreclose a mortgage executed by the defendant, on three lots in the City of Memphis, which had been duly registered to secure the payment of two notes, of \$2500 each, dated July 22, 1862, due in twelve and twenty-four months from date, payable at the Union Bank, indorsed by Stillman & Beach. The answer of the defendant and the proof shows the consideration for which the notes were executed was Confederate Treasury notes. The Chancellor dismissed the bill; from which the complainant has appealed.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the Court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence (3 *Head.* 297 and 723; 6 *Bing.* 174; 10 *Bing.* 110). This Court held in the case of *Overall v. Wright, deceased*, at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury notes were issued for an unlawful purpose, and in violation of the laws of the State and Constitution of the United States, and that all contracts founded upon them were illegal, and could not be enforced through the Courts. In the case of *Craig v. The State of Missouri*, the Supreme Court of the United States held a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void (4 *Peters.* 410), the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the Court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

There is no error in the decree of the Chancellor, and the same is affirmed.¹

McLAUGHLIN v. COSGROVE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868.

(99 Mass. 4.)

Writ of entry by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the Superior Court, on agreed facts which are stated in the opinion, Reed, J. directed a verdict for the tenant, and reported the case.

J. C. Kimball for the demandant.

T. H. Sweetser (*G. Stevens* with him) for the tenant.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March, 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the

¹ *Accord, Drexler v. Tyrrell*, 15 Nev. 114 (1880); *Peed v. McKee*, 42 Ia. 689 (1876).

consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the right to redeem is foreclosed, he then has an absolute title; and the value of the land is applied, by operation of law, to the payment of the debt secured by the mortgage.

In a case like the present, it is as if the mortgagor had purchased the liquors, and paid for them by an absolute conveyance of the land. If, then, the demandant can recover, it must be on the ground that the property given in payment for liquors illegally sold can be recovered back. But such is not the law. Payments made for intoxicating liquors in money, labor or personal property, may be recovered back (Gen. Sts. c. 86, § 61; *Walan v. Kerby, ante*, 1.). But the statute does not extend to payments made in real estate. The demandant has lost her claim to the land by not bringing her action till after the mortgage was foreclosed.¹

Judgment for the tenant on the verdict.

ATWOOD v. FISK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869.

(101 Mass. 363.)

Two bills in equity to compel the surrender or cancellation of two overdue promissory notes, dated in 1861, and signed by the plaintiffs respectively, with Joseph Atwood, each note for the payment by the promisors, jointly and severally, to the order of the defendants, of \$1340, in equal semi-annual instalments of \$67, with interest; and of two mortgages of real estate, containing the usual power of sale clauses, given by the plaintiffs, respectively, to the defendants, to secure the payment of the notes. The ground on which the bills were sought to be maintained was, that the consideration of the notes and mortgages was a promise of the defendants to the plaintiffs, to forbear to prosecute Joseph Atwood, who was a bookkeeper in the employ of the defendants, for embezzling money of his employers; that therefore the instruments were null and void; but that, so long as they remained outstanding, they constituted a cloud on the title of the plaintiffs in the real estate, and might be used to the injury of the plaintiffs at some future time when evidence of the illegality of their consideration should be lost. The answers denied the plaintiffs' allegations con-

¹ *Accord, Sample v. Barnes*, 14 How. (U. S. Sup. Ct.) 70 (1852).

cerning the consideration for the instruments, and alleged a lawful consideration therefor. Issue was joined on the answers, and the cases were reserved by Colt, J., on the bills, answers and evidence, for the determination of the full Court.

AMES, J. A note, given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal. The plaintiffs insist that the notes referred to in their bills of complaint fall within this rule of law.

But it has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand: not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice Wilmot in *Collins v. Blantern*, 2 Wils. 350, "all writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto* (1 Story Eq. § 298; *Claridge v. Hoare*, 14 Ves. 59).

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question, they could avail themselves of the maxim

above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors, or plaintiffs, and apparently are in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration, why should the court lend its process to aid one party to the illegality, rather than the other? What superior equities, in that view of the case, have these plaintiffs over the defendants? We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony, or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement, and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case (*Worcester v. Eaton*, 11 Mass. 375).

We see no occasion for the interference of the court, as prayed for, upon any view of the case. If the bookkeeper embezzled the funds of his employers, he not only committed a crime, but he also incurred a debt. This debt he was legally and morally bound to pay, and the defendants had a right to make use of all lawful and proper means to enforce its payment or to obtain security. The rule of the common law, that all civil remedies in favor of a party injured by a felony are either merged in the higher offense against public justice, or suspended until after the termination of a criminal prosecution against the offender, is no part of the law of Massachusetts (*Boston & Worcester Railroad Co. v. Dana*, 1 Gray, 83). The fact that the debt grew out of a breach of trust, and had its origin in fraud and criminality, is not a reason, as a matter of law, for bestowing upon the debtor any peculiar privileges or exemptions. If the suppression of a criminal prosecution was one of the considerations for the contracts made and securities given by the plaintiffs, they can avail themselves of that fact as a defense in any suit at law against them upon such contracts. They are in no danger of losing the benefit of that defense in consequence of any transfer of the notes to a third person. Some of the instalments were overdue and unpaid, and for that reason no indorser could so hold them as to deprive the plaintiffs of their defence. As to the exercise by the mortgagees of the power of sale given by the terms of the mortgages, it cannot be difficult for the plaintiffs to see

that any purchaser at such sale should be fully notified (if notice should be thought necessary) of all grounds of objection to the notes and mortgages, and of their intention to contest any title which such purchaser shall venture to buy at the sale. It is well settled that all defenses (except the statute of limitations) that can be made against the notes, can also be made against the mortgages (*Vinton v. King*, 4 Allen, 562).

Whether the evidence reported can be said to prove the alleged illegality in the contract is a question which we have not found it necessary to decide, or even to consider. In any view that can be taken of that question, the plaintiffs are not in a position to claim the equitable relief prayed for; and therefore, in each case, the

*Bill is dismissed, with costs for the defendants.*¹

SHAW v. CARPENTER.

SUPREME COURT OF VERMONT. [IN CHANCERY.] 1881.

(54 Vt. 155.)

Petition to foreclose a mortgage. Heard on petition, answer, general replication, and the report of a special master, at the September term, 1880, Chittenden County, Taft, Chancellor. The court ordered, *pro forma*, that a decree of foreclosure be rendered against the defendants, for \$51.71.²

The opinion of the court was delivered by

ROYCE, Ch. J. This cause was heard upon the report of a special master appointed to ascertain and report the amount due on the mortgage described in the petition.

It appears from the report that on the 24th day of July, 1872, one Benjamin D. Peterson, who was then engaged in the business of bottling cider, soda, and mineral waters, at the city of Burlington, sold the good will of the business and all his stock—tools, bottles, machinery, and fixtures, then in use by him in said business, as specified in certain inventories, which were signed by the said Peterson, to the defendant Carpenter.

Upon said inventories the various articles sold were separately carried out, with a separate price for each item. The footings of the separate pages were brought forward upon the last page, where the aggregate correctly appeared of the sum \$3221.81. To this

¹ *Accord, Patterson v. Donner*, 48 Cal. 369 (1874); *Albertson v. Loughlin*, 173 Pa. St. 529 (1896).

² The report of the master is omitted.

amount an item of \$116 was added, which was included in the note first due. It is not found what the consideration for that item was. The good will of the business was included in the sale, and was not estimated in the inventory. It is probable that it may have been estimated by the parties at that time. For the amount so ascertained the defendant Carpenter executed four promissory notes payable to said Peterson, or order, and secured the same by the mortgage sought to be foreclosed. Said notes have all been paid, but the last, which was for \$800; and that fell due on the 24th of July, 1876. The interest on that note was paid to the 24th of July, 1876.

On the 28th day of October, 1872, and before the maturity of any of said notes, Peterson sold them and the mortgage for an adequate consideration to the petitioner, the petitioner then believing the notes to be based on a valid and legal consideration, and not suspecting that any illegal element entered into the consideration.

Of the property sold by Peterson to Carpenter, and which formed a part of the consideration of said notes, the master has found there were the following goods, in kind and amount: Lager beer, \$23.94; cider, \$422; ale, \$209.38; porter, \$6.72; alcohol, \$2.25.

The defendant Carpenter claims that if any part of the consideration for the notes was illegal, they are void; that no recovery could be had upon them; and that a court of equity cannot grant any relief to the petitioner.

The first inquiry is, was the sale of any of the articles above enumerated prohibited by law? It is found that the lager beer was not an intoxicating drink, and its sale was not then prohibited, the act forbidding its sale having been passed in 1878. The sale of the cider was not illegal, unless the place where it was sold was a place of public resort.¹

The sale of the ale, porter, and alcohol being illegal, the consideration for the notes, as far as the value of those articles went to make up the amount for which the notes were given, was an illegal consideration.

The important question in the case is, as to the effect that such partial illegality of consideration is to have upon the rights of the parties. *Robinson v. Bland, administratrix of Sir John Bland*, 2 Burr. 1077, has always been regarded as a leading case; and opinions were given in it by Lord Mansfield and Justices Denison and Wilmot. The declaration contained three counts; the first, upon a bill of exchange; the second, for money lent and advanced; and the third, for money had and received. A verdict was found for the plaintiff for £672, the amount of the bill of exchange. It was found

¹ The discussion of this question is omitted, the conclusion reached being that the sale of the cider was not illegal.

that the consideration for the bill of exchange was £300, lent by the plaintiff to Sir John Bland at the time and place of play; and £372 were lost at the same time and place by Sir John Bland to the plaintiff at play. It was held that the £372, part of the consideration for the bill, being for money lost at play, could not be recovered, all such securities being void under the statute; and that a part of the consideration for the bill being illegal, no recovery could be had under the first count; that the plaintiff was entitled to the £300 lent, and was allowed to recover it, under the count for money lent and advanced.

Judge Denison says there is a distinction between the contract and security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security. That, being entire, is bad for the whole. Judge Wilmot: "As to contracts being good and the security void,—the contracts may certainly be good, though the security be void."

The same principle as to such a security being void was enunciated in *Scott v. Gilmore*, 3 Taunt. 226. See also *Fundt v. Roberts*, 5 Serg. and Rawle, 139; *Phillips v. Cockayne*, 3 Campbell, 119; *Edgell v. Stanford*, 6 Vt. 551. These two first cases have oftenest been quoted as authority for the rule that has generally prevailed in the English and American courts, that where a part of the consideration for a security is illegal the whole security is void.

The cases referred to by counsel for defendant were all cases where attempts were made to enforce such securities, and the cases of *Hinesburgh v. Sumner*, 9 Vt. 23, and *Woodruff v. Hinman*, 11 Vt. 592, were of the same kind. In none of these cases was the court called upon to decide what the effect of holding the security void would be upon the original contract, where that was bad, in part, upon a good and legal consideration.

In *Carlton v. Woods*, 28 N. H. 290, the question was presented. The declaration, in that case, contained counts upon several promissory notes, and a count for goods sold and delivered. The plaintiff agreed to sell the defendant a stock of goods and groceries at cost and freight. A schedule of the articles was made, and the cost of each. The sum total of the cost of all the articles was divided into several parts, and the notes declared upon were given for the same. Among the articles so sold were some spirituous liquors illegally sold, the price of which formed a part of the consideration for the notes. A verdict was taken for the plaintiff, for the cost of the goods remaining unpaid, except the spirituous liquors; and judgment was to be rendered on the verdict, or it was to be set aside, as the opinion of the court should be. It was held that the counts upon the notes were not maintainable; that the consideration of the sev-

eral notes was, in part, illegal, and, therefore, no recovery could be had upon them; that the legal effect of the contract was, that each article was to be valued separately, and that the sale and delivery of each article formed the consideration for the promise to pay for it; that the contract was divisible; and, while the separate value of the articles sold could be ascertained, as fixed by the parties, the principle is not readily seen, which would defeat the right of recovery for the stipulated price of that portion, the sale of which was legal; and judgment was rendered on the verdict. The same was substantially held in *Walker v. Lovell*, in the same volume, 138. The law does not favor any party in evading payment, while he retains the consideration.

The notes which were given for the good will and property sold to Carpenter were all infected with illegality, and the defense of illegality attached to all of them; so that, if what is now claimed as a defense can be allowed, if proceedings had been instituted to compel payment before anything had been paid, the entire claim could have been defeated, notwithstanding Carpenter had received, and was in the enjoyment of the property, upon the ground that the portion of the property above enumerated was illegally sold. It has somewhere been said, that the declaring such a security void was to be regarded as a punishment of the party for having made an illegal contract. The loss of the property illegally sold would generally be considered a sufficient punishment, certainly, when the sale was only *malum prohibitum*, and no wrongful intention appears. But a court of equity could never hold that one might be deprived of his entire fortune, because, in the consideration agreed to be paid for it, there was intermingled some article the sale of which was prohibited. We regard the case of *Carlton v. Woods*, *supra*, as sound law and well sustained by authority. Its application works out just and equitable results, and we shall apply the principles there enunciated in the decision of this case.

Peterson could have recovered against Carpenter in an action of assumpsit, for all that was sold to him, except the ale, porter, and alcohol. The mortgage would be treated as security for the debt due from Carpenter, on account of the property legally sold to him. Peterson might have foreclosed the mortgage, and thus have compelled payment of the debt.

The petitioner, by his purchase of the notes and mortgage, acquired all the rights, legal and equitable, of Peterson. He could maintain a suit at law for his own benefit, in the name of Peterson, or a petition in equity, as assignee of the mortgage, to foreclose it. And in the disposition of such a petition it is the duty of a court of equity, which has been said to be the great sanctuary of plain dealing and honesty, to compel the payment of that portion of

the debt that was secured by it, that was legally and fairly contracted.

The decree of the Court of Chancery is reversed and cause remanded, with mandate that a decree be entered for the petitioner for the amount due on the note for \$800 described in the petition, with interest after deducting therefrom the sums of \$209.38, \$6.72, and \$2.25, being for the ale, porter, and alcohol illegally sold,—as of the date of the note. If the amount due cannot be ascertained from the computations made by the master, it is to be ascertained in such manner as the court may direct.

Dissenting opinion was delivered by

Ross, J. I am unable to concur in the decision of the court in this case. On the facts found by the master, it may be questionable whether the sale of the cider was illegal, within the exact terms and language of the statute. However, when a man establishes a business for the bottling and sale of cider and other fermented drinks in a city like Burlington, has a warehouse for storing, manufacturing, bottling, and vending the same, and keeps an office, he so far makes the place of his business a place of public resort for the sale of cider, although the vending is carried on by solicitation of orders at the houses and places of business of his customers, and the delivery of the bottled cider is at the latter places, that in my opinion, it comes within the spirit and scope of the statute, and without any forced construction, within its language. But I do not regard this point very material; and should not on this ground have placed my dissent upon record. A part of the consideration of the note being illegal, the note is void and no action can be maintained thereon to enforce its collection. To the cases cited by the court, in the main opinion, may be added *Cobb v. Cowdery et al.*, 40 Vt. 25; *Bowen v. Buck*, 28 Vt. 308. In *Cobb v. Cowdery*, *supra*, the distinction is taken between a consideration, in part void, and a consideration in part illegal. The note failing, what is there left for the mortgage to stand upon? The mortgage is but an incident to the debt it secures. On the authorities cited by the court in support of its decision, as well as all the reasoning, partial illegality of consideration avoids all securities. The note was a security, or evidence of the debt, of a higher nature than the original contract. The latter was merged in the note. The note in suit, and all the notes secured by the mortgage, were tainted by illegal consideration entering into them. Each note being an entire contract of itself, no division of the legal from the illegal part of the consideration could be effected. Courts established for the enforcement of law will not give aid or countenance to anything illegal; nor, where the illegal is commingled with the legal, will they aid in separating, or purging the former from the latter. Their

proper function is to establish and enforce the legal and to condemn and punish the illegal. Where a part, however small, of the consideration of an entire contract is illegal, the whole contract is tainted, and courts will not compel its performance. *Collins v. Blanton*, 2 Wils. 341, is a leading case on this subject, in which the Lord Chief Justice Wilmot uses the quaint but forcible, and often quoted language: "*You shall not stipulate for iniquity*; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul! O procul este, profani.*" The mortgage is an entire contract. Its consideration was the notes, the payment of which was therein secured; every one of which was tainted with an illegal consideration in part. It was not given to secure the performance by Carpenter of his contract with Peterson, of July 24, 1872, by which he purchased his business and stock in trade, but was given solely to secure the payment of the notes which were executed in payment of that purchase. If the action were upon the notes, it is conceded that no recovery could be had; because every one of them is tainted with illegal consideration. The illegal could not be separated from the legal portion of the consideration; and an enforcement of the collection of the notes would be the enforcement of an illegal contract. How does it differ when the mortgage, which is but an incident to the notes, is allowed to be foreclosed? Is it not an enforcement of an illegal contract? To foreclose the mortgage for the legal part of the consideration, must not the illegal portion be ascertained and rejected; which the majority hold could not be done, if the action were upon the notes? What is the foreclosure but an action upon the notes described in its condition? and to ascertain the legal part of the consideration of the mortgage must not the notes be treated as divisible? I can see no other means of separating the legal from the illegal part of its consideration. In *Vinton v. King*, 4 Allen, 562, Metcalf, J., says: "In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defense (the Statute of Limitations excepted, 19 Pick. 535) which he might show in defense of an action on the note." I am not aware of any exception to the rule thus stated, nor of any case to the contrary. I am not unaware that Mr. Jones in his work on mortgages, § 620, says: "The mortgage may be upheld for such part of the consideration as was *free from the taint of illegality* when the consideration is made up of several distinct transac-

tions, some of which are legal, and others are not, and the one can be separated with certainty from the other." The cases he cites support this doctrine: *Feldman v. Gambel*, 26 N. J. Eq. 494; *Williams v. Fitzhugh*, 37 N. Y. 444; *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Cook v. Barnes*, 36 N. Y. 520.

It may well be admitted that a mortgage given to secure the payment of several notes, or debts, a part of which arose out of wholly legal transactions, and a part of which were tainted with illegality, could be enforced to compel the payment of the former alone. In such a case the orator would not have to show in evidence, nor rely upon anything illegal, in maintaining his suit. In the language of Gibbs, Ch. J., in *Simpson v. Bloss*, 7 Taunt. 246, in speaking of *Faikney v. Reynous*, 4 Burr. 2069, and *Petrie v. Hannay*, 3 Term Rep. 418: "The ground of their decision was, that the plaintiffs required no aid from the illegal transaction to establish their case." This, as I understand, is the test most frequently applied in this class of cases. If the plaintiff can show a good cause of action, independent of, and without bringing into the case anything illegal, either by way of proof or otherwise, he may maintain his action therefor. If, on the other hand, he derives any aid from the illegal part of the transaction, by being obliged to show it to make out the legal part, or otherwise, he must fail. The court will not allow the unclean thing within the temple of justice. In the foreclosure of his mortgage the orator was bound to show in proof his notes, every one of which was tainted with illegality; and for that reason the notes all fall, and the mortgage given to secure them alone, falls with them. This point my brethren have not deemed worthy of their attention, nor alluded to. But if I am in error on this point, I cannot concur with my associates in holding that the original contract is divisible. It is in writing, and amenable to the rules of evidence which forbid varying, lessening or enlarging such contracts by parol testimony. It is in the following language: "In consideration of three thousand three hundred thirty-seven dollars and eighty-one cents received of John W. Carpenter, I, Benjamin D. Peterson do hereby sell, transfer and assign unto said Carpenter the good will of a certain business for bottling cider, soda and mineral waters, now carried on by me in Burlington, together with all the stock, tools, bottles, machinery and fixtures, now in use in said business, as specified in certain inventories hereto attached, and I agree to deliver to said Carpenter the gross amount of property described in said inventories, which said inventories are signed with my name." The inventories are referred to and made a part of the contract to show what personal property was to pass with the good will of the business. They are not referred to for the price of the several articles included. The master has found that the aggre-

gate of the prices there carried out, did not amount to the sum named in the contract, and for which the notes were given, into \$116. Hence, if the prices carried out on the inventories are to be regarded as a part of the contract, they do not show that the articles were severally sold for the price set against them, but the reverse. The contract is to be construed as a whole. Thus construed, it is an entire, indivisible contract. It was a sale of a business, as a going concern, including the good will, stock in trade, machinery and fixtures. It is not to be inferred, or intended, that Peterson would have sold the good will of the business, without selling the stock in trade, machinery and fixtures, nor that Carpenter would have purchased the latter without the former. It was not the sale of the good will as one separate transaction, of each bottle, barrel, and fixture as another separate transaction, and so divisible. But one consideration is named or paid; and but one thing is sold—the business, including the stock, &c., and good will, as a going concern. As said by Devens, J., in *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91: “If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire (*Miner v. Bradley*, 22 Pick. 457). So if the purchase is of goods as a particular lot, even if the price is to be ascertained by the number of pounds in the lot, or number of barrels in which the goods are packed, the contract is also held entire (*Clark v. Baker*, 5 Met. 452; *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350). While in the cases last referred to, it could be ascertained what was the amount of consideration paid for each pound, or barrel, yet the articles having been sold as one lot, it was to be inferred that one pound or barrel would not have been sold unless all were sold.” On these principles, if the mortgage can be upheld as a security for the payment of the consideration of the original contract, as well as the notes given in payment therefor, the consideration of the contract is entire, indivisible, and tainted with illegality, and for that reason void, and should not be enforced. To my mind, the cases principally relied upon by my associates are not authority for their decision. In *Robinson v. Bland*, 2 Burr. 1077, the transactions were separate and distinct. One was borrowing three hundred pounds; the other losing three hundred seventy-two pounds in gaming. While the bill of exchange given for the two was held to be void because tainted with in part illegal consideration, the plaintiff was allowed to recover on the count for money loaned, for the three hundred pounds borrowed by the intestate. The plaintiff could establish this part of his claim without the aid of the other, in any manner. The remark of Justice Denison, made in that case: “There is a distinction between the *contract* and the *security*. If

part of the contract arises upon a good consideration, and part upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole," is not to be pressed beyond the case in hand, and given universal application. His language, as to its being "*divisible*," was true as applied to the facts of that case. The law was more accurately expressed by Mr. Justice Wilmut: "Here are two sums demanded, which are blended together in one bill of exchange; but are divisible in their nature, as to the money lent. The cases that have been cited are in point, that it is recoverable." *Carleton v. Woods*, 28 N. H. 290, comes nearer to supporting the decision of the majority of the court, but in my judgment, is distinguishable from the case at bar. It is there distinctly held that if the contract is entire, and part of the consideration is illegal, the contract is void; but that where an entire stock of goods is sold, at one and the same time, but each article for a separate and distinct agreed value, the contract is not to be regarded as entire and indivisible. The sale was for cost and freight, and Woods, J., says: "We are unable to see how this case differs from the case of a sale by a merchant of various goods to his customers, at one and the same time, for separate values, stated at the time, which, when computed, would, of course, amount to a certain sum in the aggregate." It was on this theory that the court held, that, although the notes could not be maintained, because a part of the consideration was for spirituous liquors illegally sold, yet, on the general counts in assumpsit, for goods sold and delivered, the plaintiff might recover for the goods sold, as the court held, independently of, and as transactions separate from, the purchase of the liquors. To say the least, this was pressing the doctrine of divisibility of a contract to the extreme verge, and I am unwilling to go further. There may have been more in the case than appears in the report, justifying the holding of the court. On the facts stated, I think the authority is clearly against that contract being divisible. That case, however, lacks the element of being the sale of a going business, including the good will, and does not appear to have been reduced to writing. In my judgment, the decree of the Court of Chancery should be reversed, and the cause remanded, with a mandate to enter a decree dismissing the bill with costs.

TAFT, J., desires me to say that he concurs in the views I have expressed, except in regard to the sale of the cider being illegal, on which point he concurs in the views of the majority of the court.

CHAPTER III. (*Continued*).

SECTION III. FUTURE ADVANCES.

PETTIBONE v. GRISWOLD.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1822.

(4 Conn. 158.)

This was a bill in chancery to foreclose the equity of redemption of the defendants in certain mortgaged premises. The bill stated, that on the 3d day of July, 1815, Giles Griswold, for the consideration of 4000 dollars, conveyed to the plaintiff's testator three pieces of land in Burlington, by a deed containing the usual covenants of seisin and warranty, to which there was a condition annexed, that if the said Giles Griswold, his executors, &c., should pay said grantee one note of even date therewith, executed to said grantee, for 4000 dollars, payable in six months, at the Hartford bank, and all other notes the said grantee might indorse, or give, for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against the said Griswold, then said deed to be void; that before the execution of this deed, the plaintiff's testator, with Griswold, executed, for Griswold's benefit, two joint notes, one to Seth Cowles, dated the 19th of April, 1814, for 2173 dollars, 97 cents, payable in six years from the date thereof, with interest annually, and one to Elijah Cowles & Co. of the same date, for 296 dollars, 95 cents, payable in six years, with interest annually; for which Griswold gave his receipt to the plaintiff's testator, and agreed to exonerate and indemnify him against all claims and demands on account of said notes; that on the 19th of September, 1815, Griswold also received of the plaintiff's testator sundry notes of hand, amounting 1148 dollars, 62 cents, dated the 21st of February, 1815, for which Griswold gave his receipt, promising to account with the plaintiff's testator on said joint note to Elijah Cowles & Co.; that the mortgaged premises have been levied upon, by several creditors of Griswold, and set off to them, respectively, on execution; that Griswold had not paid and indemnified the plaintiff's testator for all the notes that he had indorsed or given for him; nor had Griswold paid all the receipts the plaintiff's testator held against him, but the notes given by the plaintiff's

testator to Seth Cowles and Elijah Cowles & Co. remain entirely unpaid by Griswold, but have been principally satisfied by the plaintiff's testator, and his estate is liable for the residue, Griswold being a bankrupt; nor had Griswold ever paid and satisfied his receipt of the 9th of September, according to the tenor thereof, but the plaintiff now holds the same unsatisfied. There were other averments, on which no question arose.

To this bill the defendants demurred; and the case was reserved for the advice of all the judges.

HOSMER, Ch. J. The plaintiff has brought his bill to foreclose a mortgage, the condition of which is, to secure to the mortgagee the payment of a note accurately described, which, it is presumed, has been paid, as there is no allegation of non-payment; and likewise to secure, "all other notes the said grantee might indorse for or give for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against said Griswold." The land mortgaged has been levied on, by executions against the mortgagor; and the controversy is between the mortgagee and the execution creditors.

The notes of hand given to Seth Cowles and Elijah Cowles and Co. were in existence at the date of the mortgage, and are not included in the condition. They might and ought to have been described, or embraced, by some intelligible description of them. But the expression, "all notes the said grantee might indorse for or give for said Griswold," manifestly refers to future contracts, and not to notes then existing. The receipt of the 19th of September, 1815, renders it necessary to proceed further in the discussion of this case, or the preceding observations would be conclusive on the whole controversy.

On the extent to which a mortgage may be taken, I shall not express a definite opinion, as the exigencies of the case do not require it. It undoubtedly may be for existing debts, existing liabilities and, perhaps, for debts to be contracted in future. But the *manner* in which it may be done, forms an important consideration. It is the policy of our laws, and experience has demonstrated the wisdom of it, that the titles to real estate should be registered for the benefit, not of the parties, but of creditors and all others interested. "All grants and mortgages of houses and lands shall be recorded at length by the town clerk; and no deed shall be accounted good and effectual to hold such houses and lands against any other person or persons but the grantor or grantors and their heirs only, unless recorded as aforesaid" (Stat. 302. § 9). It is the object of this law to prevent fraud and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incum-

brances on the land mortgaged. A creditor is not obliged by law to make inquiry *in pais* concerning the liens on the property of his debtor; but on application to the record he may acquire all the information which his interest demands. At least, he must have the power of knowing from this source the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors.

The condition of the deed under discussion, is dangerously indefinite and is at war with the policy of the recording system. It embraces all future notes and receipts without the designation of any, and baffles the inquiry of creditors and others relative to the condition of the mortgaged estate. A condition to a deed made to secure all future supplies, debts and liabilities, of every possible nature and description, would not be more lax and indefinite. The creditor could know nothing from an examination of the record, and must be cast on his debtor for information, the very person who would be least inclined to give it; and successive obligations, fictitious or actual, might be made to lock up his land, in defiance of every claim against him.

I am well aware that absolute certainty is not always to be expected from an examination of the records of land titles; but there always may and ought to be a certain object after which suitable inquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another in the office of sheriff or collector; or as administrator on an estate. In all these cases an inquiring creditor cannot know from the town record the precise incumbrance; but, he has notice of certain definite facts, which point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds, which neither communicate any certain information nor designate any track in pursuance of which information may be obtained.

The other Judges were of the same opinion.

*Judgment to be entered for defendants.**

* *Accord*, *North v. Belden*, 13 Conn. 376 (1840); *Bramhall v. Flood*, 41 Conn. 68 (1874); *Stearns v. Porter*, 46 Conn. 313 (1878); *Garber v. Henry*, 6 Watts. (Pa.) 57 (1837), *semble*; *Bullock v. Battenhausen*, 108 Ill. 28 (1883). Compare *Bell v. Fleming's Exrs.*, 12 N. J. Eq. 1, 490 (1858, 1859).

STOUGHTON v. PASCO.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1825.

(5 *Conn.* 442.)

This was a bill in chancery, brought by Stoughton, to redeem mortgaged premises.

The plaintiff and Jonathan Pasco were trustees of the goods and effects of one Stephen Heath, deceased, for the benefit of certain legatees, according to his last will and testament. The amount of the property in the hands of the trustees, in February, 1812, which had been inventoried, was, at the inventory price, 6501 dollars, 28 cents, and of property not inventoried, 302 dollars, 50 cents. On the 8th of February, 1823, Jonathan Pasco, as trustee as aforesaid, was justly indebted to the plaintiff in a large sum, the amount of which was, at that time, unascertained. To secure such sum, on the day last-mentioned, he executed a mortgage deed of the premises to the plaintiff, which was duly recorded, with a condition subjoined in these words: "If said Pasco shall pay to said Stoughton all monies in his hands belonging to the estate of Stephen Heath, deceased; and also deliver to said Stoughton all notes and other securities for money belonging to said estate in his hands; and shall, in all respects, render to said Stoughton a true account of all monies and securities for the payment of money belonging to said estate, within twenty days from this date; and shall pay to said Stoughton his the said Pasco's note of hand, payable to said Stoughton, for the sum of 210 dollars, on demand, with interest, dated March 5th, 1814; then this deed to be void," &c. The court found, that there was due to the plaintiff from said Pasco for monies and effects in his hands of the estate of Stephen Heath, deceased, intended to have been secured by said mortgage deed, the sum of 3137 dollars, 85 cents; besides the amount of the note mentioned in the mortgage. By subsequent deeds, dated the 8th and 22d of February, 1823, and duly recorded, Jonathan Pasco mortgaged the premises to Ashna Pasco, after a computation between the said Jonathan and the plaintiff, ascertaining the debt due to the latter. Before the execution of these mortgages, and before the debts secured by them had accrued, Ashna Pasco had notice, by information from Jonathan, of such computation and settlement, and that the sum due to the plaintiff was more than 2800 dollars.

Jonathan and Ashna Pasco were made parties defendants to the

bill. As against Jonathan the court decreed a foreclosure, but denied the relief sought against Ashna, considering the mortgage in question to be void in relation to him. To review this determination, the plaintiff procured the record to be transmitted to this Court, pursuant to the statute.

HOSMER, Ch. J. The general question in this case is whether the mortgage made by Jonathan Pasco to the plaintiff is void in respect of Ashna Pasco, a subsequent mortgagee, except as regards a small debt by promissory note.

The objection made, on the defendant's part, to the granting of the prayer of the plaintiff's bill, is founded on the law requiring the recording of deeds. It is insisted that the policy of the recording system will be violated by giving validity to a mortgage, containing, as the one in question is supposed to do, no reasonable certainty in the description of the debt intended to be secured. The determination of this Court in *Pettibone v. Griswold*, 4 Conn. Rep. 158, is principally relied on; and is claimed to sustain the defendant's objection.

There are two questions embraced in the present case. The first is, whether the demand of Stoughton is of such a nature as to authorize the mortgage security; and the second is, whether it is described with such reasonable certainty that, in respect of it, a subsequent mortgagee is legally affected with notice.

1. In *Pettibone v. Griswold*, before cited, it was said, that a mortgage may be taken "for existing debts, existing liabilities, and perhaps for debts to be contracted in future." The court has found, that Jonathan Pasco was justly indebted to the plaintiff, as trustee on Heath's estate, in the sum of 3137 dollars, 85 cents; and that this sum was intended to be secured by the mortgage deed to Stoughton. The precise sum of money due to the plaintiff had not been ascertained at the date of the mortgage; and hence the phraseology of the condition, that if Jonathan Pasco should pay to Stoughton all the monies, and deliver to him all the securities for money in his hands, belonging to Heath's estate, and render a true account, the deed should be void. That Jonathan Pasco was under a legal obligation to do what he stipulated, and that, as to him, Stoughton had a just demand, to the extent of the stipulation, must be implied by every one who reads the above condition. It would not enter into the imagination of any one that the mortgage was for a sum of money not due; and that, contrary to common sense and universal usage, Pasco had made a pledge of his estate to secure to the plaintiff a mere gratuity. But this point need be pursued no further, as the court, in the decree passed, considered the mortgage valid as between the parties.

2. The question remains whether the demand of the plaintiff is

described in the mortgage, with such reasonable certainty, as from the record to affect a subsequent mortgagee with notice.

Now, what would such person understand from reading the aforesaid condition? On the principle of constructive notice of the record, the subsequent mortgagee must be supposed to have read the deed with its condition; and hence the propriety of the proposed question. On such perusal, he must be presumed to know that the mortgage was for a debt in some manner resulting from the trust estate in the mortgagor's hands, due to the co-trustee, the plaintiff; that the precise amount, at the date of the mortgage, was not ascertained; that it embraced all the monies and securities of Heath, in the hands of Pasco; and that this person had bound himself to render a true account of his indebtedness. In addition to this, let it be remembered that Ashna Pasco, previous to the delivery of either deed to him, had information from his mortgagor that the account between Jonathan Pasco and Stoughton had been adjusted, and that the sum now claimed as a debt was acknowledged to be due.

That the condition of a mortgage deed must give *reasonable notice* of the incumbrance on the land mortgaged, is an established principle. This is the undoubted criterion, by which, in respect of third persons, the validity of the mortgage is to be tested. What, then, is reasonable notice? Is it requisite that the condition should be so completely certain, in every particular, as to preclude the necessity of all extraneous enquiry? Certainly not. It was adjudged in *Pettibone v. Griswold*, before cited, that a mortgage to indemnify a surety for the official good conduct of another is valid universally; and yet the event on which an indebtedness may arise, as well as the amount, are utterly unforeseen and contingent. Without a specification of either of these facts, there exists that reasonable notice which, in favor of those who are not parties to the mortgage, the law demands. The object of the recording law is to prevent fraud on purchasers and creditors; and such facts must be reasonably notified as are sufficient for this purpose; but, as has been shewn, notice perfect and complete, without any enquiry *dehors* the record, is not required.

One head of presumptive notice is this: that the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. Hence it has become a principle in a court of equity, that the notice which presents a certain object, concerning which successful enquiries without unreasonable inconvenience may be made, is sufficient. In *Peters v. Goodrich*, 3 Conn. Rep. 150, the above principle was recognized and applied. Curtis executed a mortgage deed to Goodrich, which was duly recorded, with condition to in-

defend him against a promissory note, of which the latter was an indorser. To foreclose the equity of redemption, a bill was brought by Goodrich, from which it appeared that the mortgage was variant from the note, both in respect of its date and of the person to whom it was payable. The defendant, who was a subsequent mortgagee, objected against the correction of these mistakes, upon the specific ground that the description in the mortgage deed must be precisely adhered to, pursuant to the supposed policy of the recording system. In the delivery of their opinion the court observed, that "as between the parties, it is unquestionably clear, that the misconception of the date of the note and of the promisee admitted of correction, on the common principles applied in chancery in similar cases; and the second mortgagee had such constructive notice of the fact from the recorded deed as placed him in no better condition than the mortgagor. Whatever is sufficient to put a person on inquiry is considered in equity to convey notice; for the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. Had the second mortgagee applied to Goodrich for information, as it was his intention to represent the facts correctly, relative to the mistakes, he would have had a communication of all the knowledge he now possesses."

The same principle was recognized by the court in *Pettibone v. Griswold*, before cited. After having declared it to be the policy of our law that the title to real estate should be registered for the benefit of creditors and all others interested, it was observed by the court: "That it is the object of this law" (the act requiring deeds to be recorded) "to prevent fraud, and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make enquiry *in pais* concerning the liens on the property of his debtor; but on application to the record, he may acquire all the information which his interest demands; at least, he must have the power of knowing from this source the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors." In the argument of this case it has been supposed that the court, in *Pettibone v. Griswold*, had required perfect and complete certainty in the condition of a mortgage, so far as relates to strangers to the transaction, and to such a degree as to preclude the necessity of any further enquiry. But the error is most obvious and resulted en-

tirely from the construction of a single sentence in the opinion expressed, disjoined from all other parts of it; as if it had been declared in the form of an axiom, and were insulated and alone. I readily admit that the paragraph immediately succeeding the rule relative to notice, was not expressed with a precision that defies all criticism. Instead of the expression "concerning the liens," more correctly it should have been "concerning the existence of the liens." It was expected, however, to receive its construction as being the part of an entire subject, each sentence contributing something to the precise development of the court's opinion; in pursuance of the maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*. More especially may it be demanded, that it be read with this qualification: "at least, he must have the power of knowing from this source," i. e., from the condition of the deed, "the subject matter of the mortgage, that his *investigation* may be guided by something which will terminate in a certain result." It is extremely obvious that the case of *Pettibone v. Griswold* was not affected by the preceding principles; and this may account for their being perhaps more loosely expressed than they would have been, had a close application of them been required. The mortgage in that case embraced *all future notes and receipts*, without the designation of any, and supplied *neither information, nor the probable means of successful enquiry*; and, as there was no imaginable check on the substitution of notes and receipts at pleasure, and without limitation of time, the policy of the recording system, if such mortgage were valid, would effectually be defeated. A condition to a deed made to secure all future supplies, debts and liabilities, would not be more dangerously lax and indefinite.

The principle contended for by the defendants is refuted by the case of *Peters v. Goodrich*, by the expressions already recited from *Pettibone v. Griswold*, and by other parts of the same case. The latter case requires that the record should contain sufficient information relative to the subject matter of a mortgage to direct the enquirer to the necessary intelligence, and to prevent a debtor, by extreme indefiniteness and generality, from the substitution of every possible demand at his pleasure. "I am well aware" (said the Judge, when delivering the opinion of the court) "that absolute certainty is not to be expected from an examination of the records of land titles; but there always may and ought to be a *certain object* after which suitable enquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another, in the office of sheriff or collector, or as administrator on an estate. In all these cases an enquiring creditor cannot know from the record the precise incumbrance; but he has notice of certain definite facts, which

point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds which neither communicate any certain information nor designate any track, in pursuance of which information may be obtained."

In the transaction of business, the exigencies of it not unfrequently require that the conditions of mortgage deeds should be as uncertain as the one under discussion; and such mortgages are unquestionably legal. Both private justice and the convenience of the public demand that they should be considered valid. The case of mortgages for the indemnity of sureties, has already been mentioned. A mortgage to secure an unliquidated book debt, or the fidelity of a factor or bailiff, whose business it is to receive money and pay it over, undoubtedly would be good; and yet there is nothing certain here but the subject matter of the stipulation.

What, then, is the fatal uncertainty existing in the description of the debt and obligation of Jonathan Pasco? The sum of the indebtedness was not, and could not be, specified; nor was it necessary that it should be; but the subject matter of the mortgage was explicitly stated. The subsequent mortgagee had notice from the record that Jonathan Pasco was indebted; and that he was accountable to the plaintiff for all the monies, and securities for money, of Heath. What the original amount was, the inventory of Heath's estate would inform him; and he would have experienced no difficulty in ascertaining the precise sum and manner of Jonathan Pasco's indebtedness. He was informed, by the mouth of his mortgagor, that a settlement had been made between him and the plaintiff; and that the balance due surmounted twenty-eight hundred dollars. Instead of effectuating the policy of the recording system by an invalidation of the plaintiff's mortgage, the court would, in that event, be instrumental in the perpetration of a hardship most inequitable. The free use and disposal of a person's property, where neither law nor policy forbids, would be inhibited; the exigencies of business, in promotion of the general convenience, disregarded; and the impracticable principle, in all cases, that mortgage conditions must contain within themselves, not reasonable certainty only, but a certainty to a certain intent in every particular, adopted. This would be conformable neither to correct principles nor to our own adjudications.

PETERS, J., was of opinion that this case was not distinguishable in principle from *Pettibone v. Griswold*; and would, therefore, affirm the decree of the superior court.

BRAINARD, J., concurred with the Chief Justice.

BRISTOL, J., said that, aside from the case of *Pettibone v. Griswold*, he should have no doubt that the mortgage in question was

good; but that case had produced some hesitation in his mind; and he was inclined to think that the present case must be governed by it.

Decree reversed.

ROBINSON v. WILLIAMS.

COURT OF APPEALS OF NEW YORK, 1860.

(22 N. Y. 380.)

Appeal from the Superior Court of the city of Buffalo. Action by the receiver of the Hollister Bank, against Williams, the receiver of the Reciprocity Bank, and other defendants, for the foreclosure of a mortgage. Prior to September, 1857, both banks were doing business in the city of Buffalo.

Upon the trial these facts were proved: On the 24th of October, 1854, the defendants Gibson and wife executed and delivered a mortgage to the Hollister Bank, which recited that in consideration of the sum of \$1 to them in hand paid, and for the purposes thereafter declared and stated, they granted and conveyed to said bank certain premises therein particularly described. The mortgage contained a further recital as follows: "Whereas, it is contemplated that the said party of the second part will hereafter from time to time make loans or advances, by way of discount or otherwise, to the said Charles D. Gibson, upon drafts, bills of exchange, promissory notes and commercial paper, either made and drawn, or accepted or indorsed by said Gibson, and it has been agreed that these presents shall be executed to indemnify and secure the said party of the second part on account of any such loans, advances or discounts: Now therefore the condition of these presents is expressly this: that if the said Charles D. Gibson, his heirs, &c., shall and do well and truly pay, retire and take up at maturity any and all such drafts, bills of exchange, promissory notes or commercial paper, as *may be discounted or advanced upon* by the said party of the second part, *for or to the said Gibson*, and shall well and truly pay at maturity all *and every such loans, discounts or advances*, as above recited, and shall well and truly indemnify pay and save harmless the said party of the second part from and against all loss, costs, damages, expenses and interests by reason thereof, then these presents shall cease and be null and void." But in case of the non-fulfilment of the above conditions, then the party of the second part was authorized to sell the mortgaged premises and to make and execute to the purchaser a deed therefor.

The mortgage was duly acknowledged on the 25th of October, 1854, and recorded on that day in the clerk's office of Erie County. On the 1st of December, 1855, the defendant Gibson drew his bill of exchange on one Greenleaf, at Boston, whereby he requested said Greenleaf to pay to his own order the sum of \$2500, sixty days from the date thereof; and before said bill became due and payable Gibson indorsed the same to the Hollister Bank, which, on the faith and security of said bill and said mortgage, discounted the same and advanced to said Gibson the amount thereof. This bill was protested at maturity, and no part thereof has ever been paid. On the 29th of December, 1855, Gibson drew another bill of exchange on Greenleaf at sixty days from date, whereby he requested him to pay to his (Gibson's) order, the sum of \$1800.

Before this bill became due, Gibson indorsed it to the Hollister Bank, which discounted it and advanced to him the amount thereof, on the faith of said bill and the mortgage. This bill was also protested at maturity, and no part thereof has been paid.

The complaint set up that the defendant Williams, among others, claimed some interest in the mortgaged premises, and prayed the usual judgment of foreclosure and sale, and that said defendant, and all others claiming interests therein subsequent to that of the Hollister Bank, might be barred and foreclosed. The defendant Williams set up and proved that, on the 29th of January, 1856, the Sackett's Harbor Bank (whose name was subsequently changed, by an act of the legislature, to that of the Reciprocity Bank), recovered a judgment against said Gibson to the amount of \$2798.29; that a transcript thereof was duly docketed in the clerk's office of Erie County on that day; that said Gibson was then the owner of said mortgaged premises; and Williams insisted that said judgment was a lien on said premises, and prior to that of the mortgage. Neither of said bills of exchange were due at the date of the recovery of said judgment. The Superior Court of Buffalo, at special term, gave judgment in favor of the plaintiff, and declared said mortgage to be a prior lien to said judgment. On appeal, the same was affirmed at general term, and from that judgment the defendant Williams appealed to this court.

DAVIES, J. There can be no doubt that, as between the original parties to this mortgage, the validity of it, as a pledge of the mortgaged premises to secure the amount of these two drafts, could not be questioned. It was clearly the intent of the parties that the lands described should stand as security for all advances and discounts made by the Hollister Bank to Gibson. If, therefore, there were no legal mortgage, there was, undeniably, an equitable one, which a court of equity would enforce against the original parties to it, and all others not in the condition of *bona fide* purchasers or

subsequent incumbrancers without notice. The advances made to Gibson were before the recovery of the Reciprocity Bank's judgment. As soon as the advances were made, they were embraced in and secured by the mortgage. That judgments and mortgages may be taken to secure future advances, though no present indebtedness was subsisting at the time of their execution or rendition, has long been well settled (*Conard v. The Atlantic Ins. Co.*, 1 Peters, 386; *Leeds v. Cameron*, 3 Sumn. 488; *Hubbard v. Savage*, 8 Conn. 215; *Walker v. Snediker*, 1 Hoff. Ch. 145; *Com. Bank v. Cunningham*, 24 Pick. 270; *Monell v. Smith & Jenkins*, 5 Cow. 441; *Lyle v. Ducomb*, 5 Bin. 585; 4 Kent's Com. 175; *Lansing v. Woodworth*, 1 Sand. Ch. 43; *Barry v. Merchants' Ex. Co.*, 1 *id.* 314; *United States v. Hooe*, 3 Cranch, 73; *Livingston & Tracy v. McInlay*, 16 Johns. 165; *Truscott v. King*, 2 Seld. 147).

In *Conard v. The Atlantic Insurance Company (supra)*, a mortgage was given to secure a debt upon a *respondentia* bond, and it was said that the debt was of too contingent a nature to uphold a mortgage as collateral security for the payment of it. Story, J., at page 448, says: "We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts as those which already exist and are certain and due."

The case of *Hooe v. United States (supra)*, is, in some respects, not unlike the present. There, one Fitzgerald conveyed property in trust to W. & J. C. Herbert, to indemnify Hooe for all indorsements or liabilities he might incur on behalf of Fitzgerald; and if Fitzgerald should pay and discharge all such liabilities, the trustees were to reconvey the property to him; but if Hooe should pay any such liabilities on account of Fitzgerald, then, on demand of Hooe, the trustees were to sell the trust property, and pay and satisfy the amount demanded by Hooe. Hooe became liable to pay several notes of Fitzgerald, indorsed by him, and on Fitzgerald's death he was largely in arrear to the United States, and they claimed a preference over all other creditors, under the laws thereof, and that such lien was superior to that created by the trust deed for the benefit of Hooe, and that it was fraudulent as to the United States. It will be observed that, in this case, no sum certain, for which the property was held in trust, was mentioned in the deed. Marshall, Ch. J., in delivering the opinion of the court, says (p. 88): "That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted to mortgage property to his creditors as a security for debts to be contracted, as well as that which is already due. All the covenants in

this deed appear to the court to be fair, legitimate, and consistent with common usage."

It is pressed upon us that this mortgage is invalid, because no sum certain is mentioned therein. There might be some force in the argument if the Reciprocity Bank stood in the position of a subsequent purchaser or incumbrancer in good faith, although it will be attempted to be shown that the mortgage would be good as against the bank, even if such were its position. That question will be considered hereafter. The Supreme Court of this State, in the case of *Monell v. Smith, supra*, held that a surety, who held a bond and warrant of attorney, conditioned to pay all notes theretofore or thereafter to be indorsed, and to indemnify him against such indorsements, might enter up judgment and issue execution thereon for the sum for which he was actually liable, although the bond was not for a specified sum. That a bond and warrant of attorney might be taken by a surety, to secure him against future liabilities to be incurred by him, the court say, is warranted by the cases cited and considered by the late Chancellor in *Roosevelt v. Mack*, 6 Johns. Ch. 266, 279-285. The court add, "the only question is, whether the same course may be pursued where the bond relates in general terms to liabilities as surety or indorser, past and prospective, without mentioning a sum certain; and we think it may. It is true, the sum does not appear on the face of the bond; and there is no doubt that, in an action on such bond, breaches must be assigned. It would be the same, however, we think, as to a bond conditioned to pay specified sums to third persons. The certainty is the same in both cases. In both, we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain. We all know the objects of the parties to these instruments. It is, to afford the most prompt indemnity."

In *Shiras v. Caig*, 7 Cranch, 34, the subject under consideration seems to have elicited a very full examination; and it was there held, that it was not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure, but it shall stand as a security for the real, equitable claims of the mortgagees, whether they existed at the date of the mortgage or arose afterwards upon the faith of the mortgage, before notice of the defendant's equity. Chief Justice Marshall, in delivering the opinion of the court, at page 50, says: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount. It is not denied that

a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real, equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation. These principles, and the cases upon which they rest, have lately been emphatically affirmed by the Supreme Court of the United States, in *Lawrence v. Tucker*, 23 How. 14.

I arrive, therefore, to the conclusion, that this is a valid mortgage as between the parties to it, and that the mortgagee was secured thereby the amount of the advances upon the two drafts mentioned in the complaint, although no sum certain was mentioned on the face of the mortgage. These advances were made prior to the recovery of the judgment of the Reciprocity Bank, and prior, therefore, to any equities of that bank. It follows, therefore, they were made prior to any notice to the Hollister Bank of any such equities. No notice could be given of that which had not an existence. It is established then, it is submitted, that, at the date of the recovery of the judgment by the Reciprocity Bank against Gibson, the Hollister Bank had a good legal, and certainly equitable, mortgage upon the premises, to secure the amount of the two drafts already referred to. Was that judgment a prior lien to the mortgage? The judgment became a lien; at the time it was docketed, upon the interest of the defendant therein in all lands in the county of Erie (2 R. S. 359). In equity, the land was undeniably bound to pay off the amount of these two drafts. The law is well settled, that the equitable mortgagee is entitled to a preference over subsequent judgment creditors (*Matter of Howe*, 1 Paige, 129, and the cases there cited; Willard's Eq. Jur., 441, 442; *Rockwell v. Hobby*, 2 Sand. Ch. 9; Hilliard on Mortg., Vol. I., 451). If this mortgage is to be regarded simply as an equitable mortgage, there can be no question that, in accordance with well-settled rules of law and a uniform current of decision, it is a valid security, and is entitled to priority over the subsequent judgment of the Reciprocity Bank.

But, I think, if that bank had been a purchaser on the day of the recovering of its judgment, or an incumbrancer by way of mortgage for money then advanced, the mortgage of the Hollister Bank would equally have been entitled to priority. The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified. There was enough to

have put a *bona fide* purchaser or incumbrancer upon inquiry; and an application to the Hollister Bank would have disclosed the sum certain for which the security was held. As was said by the Supreme Court in *Monell v. Smith, supra*, "we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain." The precise sum for which the mortgage was held as security might, at any time, readily and with certainty, have been ascertained, and a *bona fide* purchaser or incumbrancer, with the notice which the record of this mortgage furnished him, if he had omitted to make the inquiry which it indicated, could hardly have claimed to have been a *bona fide* purchaser or incumbrancer. The authorities bearing on this question of notice are fully reviewed in the case of *Williamson v. Brown*, 15 N. Y. 354, and the result of them stated as follows: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser." But we are not without direct authority on the point now under consideration. The case of *Kramer v. The Trustees, &c., of the Farmers' Bank of Steubenville*, 15 Ohio, 253, is of this character. The question there was, originally, whether mortgages given to one Doyle, in May, 1840, were to have priority over those given to one McDowell, which, though dated prior to Doyle's mortgage, were not recorded until 30th September, 1842. The mortgage to Doyle specified no sum in it, but the condition was, "that, whereas the said Alexander Doyle had theretofore indorsed paper of the said Wells, Henry & Co. (the mortgagors), and had also promised to make further indorsements, it was provided that if the said Wells, Henry & Co. should indemnify and save harmless the said Doyle, then the said deed was to be void," &c. Doyle alleged that, relying on this indemnity, he had continued to indorse for the mortgagors, and claimed that his mortgage was a prior lien to that of McDowell and of the judgment creditors. The court sustained Doyle's claim, and directed a sale of the property mortgaged, and that he be paid the amount of his liabilities. Kramer and others, judgment creditors, filed a bill of review, claiming that the court had erred in giving validity and priority to Doyle's mortgage. Among other things they alleged that Doyle's mortgages were not good and valid as against the complainants, because they were void for uncertainty, and it could not be ascertained how or when the same became forfeited, or how the same could or would be satisfied. In the opinion, at page 260, the court

say, "Doyle had a right to ask indemnity, and the mortgagors had a right to give it. It was done by way of mortgage; and although these mortgages were intended to cover subsequent as well as previous liabilities, they could not, on this account, be objectionable as between the parties. If, during the existence of these mortgages, a third person had recovered a judgment against the mortgagors, the lien of such judgment might, and probably would, have been preferred to the lien of the mortgagees for liabilities subsequently incurred by Doyle. But these complainants are not in that situation. The liabilities of Doyle had been fixed before the rendition of their judgment. It is not perceived that there would be any difficulty in ascertaining when the condition of the deeds was broken and the mortgage forfeited, nor as to the manner in which they could be satisfied. A similar rule may be deduced from the following cases in Connecticut: *Merrills v. Swift*, 18 Conn. 266; *Lewis v. De Forest*, 20 *id.* 442; *Ketchum v. Jauncey*, 23 *id.* 127.

In any aspect in which this case may be regarded, we think it free from doubt, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

YOUNGS v. WILSON.

COURT OF APPEALS OF NEW YORK, 1863.

(27 N. Y. 351.)

Appeal from the Supreme Court. Action to foreclose a mortgage. The complaint set forth a bond, executed by Moses W. Eastman to George Youngs and Abel Hunt, bearing date June 4, 1849, in the penal sum of two thousand four hundred dollars, with a condition similar to that of the mortgage next mentioned.

It also set forth a mortgage, bearing the same date and between the same parties, by which Eastman conveyed to Youngs and Hunt certain lands in Yates County, which were particularly described, which conveyance was made subject to the following condition, viz.: "That if the said Moses W. Eastman shall well and truly pay, and save harmless, and indemnify the said George Youngs and Abel Hunt, and each of them, of and from all liabilities which they, or either of them, may have at any time heretofore contracted to and for the said Moses W. Eastman, either as surety, indorsers or guarantors, or otherwise, whether now due or yet to grow due, and shall save harmless the said George Youngs and Abel Hunt, and

each of them, of and from all damages, costs and charges on account of the same," then the conveyance was to cease; but in case "default should be made in the payment of all or any part of the said liabilities, as the same should become due," the lands were to be sold and the amount due, with costs and charges, to be deducted from the proceeds, and the surplus, if any, paid to the mortgagor.

The complaint also stated, that the mortgage was duly recorded in the clerk's office of Yates County, on the day of its date; that Youngs had paid debts of Eastman, on which he was liable as surety or indorser, at the time when the mortgage was executed, which amounted to \$724.61 [of which a particular account was given]; and that the estate of Hunt remained liable on a note given by Eastman to one Owens, on the 24th day of December, 1846, for \$263, on which said Hunt was indorser, which, with interest, still remained unpaid; that the mortgaged premises had been conveyed to the defendant, James Miles, who, with the other defendants, claimed some interest in the premises, which interest had accrued subsequent to the lien of the mortgage. There was the usual prayer for a foreclosure, and a sale of the mortgaged premises, and payment of the plaintiffs' demands and costs out of the proceeds.

The usual judgment of foreclosure for the sale of the mortgaged premises, and the payment, out of the proceeds of the sale, of the costs and expenses, and the amounts found due to the several plaintiffs, was entered at a special term: from which judgment Lewis O. Wilson, only, appealed to the Supreme Court at general term. On the hearing of that appeal, the judgment at the special term was reversed, and the complaint dismissed, as against the appellant, with costs, on the ground that the mortgage was fraudulent and void, as against creditors of the mortgagor, for uncertainty in respect to the debt or debts it was intended to secure.

From that judgment the plaintiffs brought the present appeal. After the bringing of such appeal both the appellants died, and the personal representatives of the appellant Youngs were substituted in his place. There had been no substitution as to the executors of Abel Hunt, and it was assumed, on the argument, that as to them the appeal was at an end.

SELDEN, J. I cannot concur with the court below in the opinion that the mortgage in question was void as against creditors or purchasers. There is no pretence, and could be none, that it was not valid between the parties to it. It described the debts which it was intended to secure, with such certainty that there could be no difficulty in determining what debts were, and what were not, embraced in the description. In such cases, the maxim,

that that is certain which may be made certain, applies. It is not requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry (*Monell v. Smith*, 5 Cow. 441; *Robinson v. Williams*, 22 N. Y. 380; *Stoughton v. Pasco*, 5 Conn. 442; *Merrills v. Swift*, 18 *id.* 257; *United States v. Hooe*, 3 Cranch, 73; *Kramer v. The Farmers' and Mechanics' Bank*, 15 Ohio, 253).

The mortgage having been duly recorded, if not fraudulent in fact, was as effectual against subsequent creditors and purchasers as it was against the mortgagor. If it was sufficiently certain to be valid against the party who made it, it was equally certain and valid against all persons claiming under him. If valid between the parties it was a mortgage, and as it was duly recorded, it was not within the provision of the statute which declares void, as against subsequent purchasers, unrecorded conveyances. The only statute bearing upon the question is the following:

"Every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance *not so recorded* shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." I can discover nothing in this statute to justify the distinction between certainty as against the party, and certainty as against subsequent creditors or purchasers, which forms the basis of the judgment of the court below. If the instrument was certain enough to amount to a conveyance, it was a recorded conveyance, and valid as such.

A purchaser, with notice of any outstanding equity against his vendor, takes the place of such vendor and acquires his rights only (*Frost v. Beekman*, 1 Johns. Ch. 301; 3 Sugden on "Vendors and Purchasers," 440); and notice of circumstances sufficient to put a party upon inquiry, has the same effect as actual notice of the facts which could be learned on reasonable inquiry (3 Sugden, 468; *Dunham v. Dey*, 15 Johns. 569; *Peters v. Goodrich*, 3 Conn. 150; *Williamson v. Brown*, 15 N. Y. 359). The registry of the mortgage was equivalent to actual notice of its existence and contents, and the purchaser, with such notice, is bound by all the equities which the holder of the mortgage had against the mortgagor, whose place he takes (*Stoughton v. Pasco*, 5 Conn. 442, 447). The condition of the purchaser in the present case is precisely the same as it would have been at common law, if he had purchased with actual notice of the prior mortgage. In that case it cannot be doubted that he would have taken subject to the mortgage, if it was valid against the mortgagor.

The rule adopted in Connecticut, in *Hart v. Chalker*, 14 Conn. 77, on which the court below placed much reliance, is, that "where a mortgage is given to secure an ascertained debt, the amount of the debt ought to be stated." I am not disposed to question the wisdom of this rule, although it would sometimes be inconvenient and do injustice, and its propriety is not free from doubt (see 5 Conn. 449); but I cannot deduce it from our statute, which merely provides that conveyances not recorded shall be void against purchasers. The mortgage of Eastman was valid between the parties; it was a conveyance, and it was recorded, and therefore was not made void by the statute.

It is only with reference to the question of an actual intention to defraud creditors, that the indefinite description of the debts intended to be secured by the mortgage could be material. What influence such indefiniteness might have in that respect, we are not called upon to determine. There is no allegation in the answer which could raise that question, and if there had been, we could not notice it, in the absence of any finding by the court below upon the question of fact (*Grant v. Morse*, 22 N. Y. 324). I am, therefore, of opinion that the court below erred in declaring the mortgage void, as against Wilson.

Upon the other questions presented by the case, so far as they related to the rights of George Youngs (and to that extent only are they now before the court), I entertain no doubt that they were correctly decided by the special term. The judgment of the general term should, therefore, be reversed, and that of the special term affirmed, as to the relief granted by that judgment to George Youngs.

There are no appellants here representing the estate of Abel Hunt, and the judgment dismissing the complaint as against the executors of that estate, will not be affected by the judgment of this court. The propriety of bringing on the argument of the appeal, without the presence of parties representing that estate, is very questionable, but as neither of the parties before the court interposed any objection on that account, the defect in the proceedings, if it be one, has not been regarded.

MARVIN, J. The judgment of the special term, in favor of the plaintiffs, was reversed by the general term, upon the sole ground that the mortgage was fraudulent and void as to subsequent creditors, on the ground of vagueness and uncertainty in respect to the debts it was intended to secure.

It is conceded that a mortgage given to secure future contingent liabilities may be valid, but the position is, that, in case the debt exists or the liability has been incurred at the time the mortgage is executed, it must be truly stated, so as to enable creditors,

upon examining the record of the mortgage, to ascertain the amount of the debt or the nature and character of the liability assumed.

The validity of the mortgage is not questioned upon the ground that there was, in fact, no valid consideration between the parties to it. In my opinion, the court erred in reversing the judgment. There was a good and sufficient consideration for the mortgage. The consideration expressed was \$2400 money; but this was not the true consideration. It has long and often been held, in this State, that the real consideration of mortgages or deeds may be shown by parol, though different from that expressed in the instrument; and this court, in *McKinster v. Babcock*, 26 N. Y. 378, applied the rule to a chattel mortgage, in which the consideration expressed was money, when, in truth, the real consideration was the indorsement of the note of the mortgagor, and the mortgage was given by way of security. This court sustained the mortgage, the referee having found as a fact that it was executed in good faith, and not with intent to hinder, delay or defraud creditors. So in this case, the parol evidence upon the trial showed what the consideration actually was, and it was sufficient, viz., liabilities assumed by the mortgagee for the mortgagor, and the amount which had been paid of such liabilities. It may be said in this case, as was said in the case just referred to, and also in *Shiras v. Craig*, 7 Cranch, 34, by Chief Justice Marshall, in which the real transaction did not appear on the face of the mortgage, that such cases are liable to suspicion; that they must sustain a rigorous examination, and that it is always advisable fairly and plainly to state the truth. And in this case, I will say that it would have been far better to have specified the liabilities assumed, so that the creditors of the mortgagor or others interested would be able more readily to examine into the facts, and ascertain whether they were true or fictitious. But, if the consideration is actually valid and sufficient, and it is found as a fact, upon sufficient evidence, that the instrument was not executed with intent to hinder, delay or defraud creditors, the court cannot declare the instrument void, as to creditors, upon the ground that the consideration, as expressed, is vague and uncertain. (See *Robinson v. Williams*, 22 N. Y. 380, in which many of the cases are referred to.)

The judgment of the general term should be reversed, and that of the special term affirmed.

Denio, Ch. J., Davies, Wright, Selden, Emott and Balcom, JJ., concurring,

Judgment accordingly.

ACKERMAN v. HUNSICKER, 85 N. Y. 47 (1881). Action to foreclose a mortgage. Certain of the defendants, who were judgment creditors of the mortgagor, answered, claiming that their judgments were liens superior to the mortgage, as to a portion of the amount claimed by plaintiff to be secured thereby. The mortgage was given to plaintiff to secure him for any indorsements he had made or should thereafter make for the mortgagor to the amount of \$6000. Some of the indorsements were made subsequent to the judgments referred to. In the opinion it is said:

"There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security on each new transaction. It is well known that such mortgages are constantly taken by banks and bankers as security for final balances, and banking facilities are extended and daily credits given in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established (*Bank of Utica v. Finch*, 3 Barb. Ch. 294; *Truscott v. Kings*, 6 N. Y. 147; *Robinson v. Williams*, 22 *id.* 380; *Shiras v. Caig*, 7 Cranch, 34; *Laurence v. Tucker*, 23 How. [U. S.] 14; *Leeds v. Cameron*, 3 Sumn. 492)".¹—*Per Andrews, J.*

¹ The cases are numerous: *Commercial Bank v. Cunningham*, 24 Pick. 270 (1837); *Goddard v. Sawyer*, 9 Allen, 78 (1864); *McDaniels v. Colere*, 16 Vt. 300 (1844); *Collins v. Cartile*, 13 Ill. 254 (1851); *Speer v. Skinner*, 35 Ill. 282 (1864); *Michigan Ins. Co. v. Brown*, 11 Mich. 266 (1863); *Madigan v. Mead*, 31 Minn. 94 (1883); *Freiberg v. Magale*, 70 Tex. 116 (1888).

BOOK III.

NATURE AND INCIDENTS OF THE MORTGAGE
RELATION.

CHAPTER I.

COMMON LAW RELATIONS.

SECTION I. TITLE.

FISK v. FISK.

HIGH COURT OF CHANCERY, 1690.

(Finch, Pre. Ch. 11.)

Thomas Fisk the elder had a mortgage in fee, which was forfeited; he makes his will, and devises all his mortgages to Thomas Fisk the younger, and makes him executor and dies: Thomas the younger proves the will, and after dies intestate. The plaintiff takes out administration *de bonis non* to Thomas the elder, and also administration to Thomas the younger, and brings this bill against the mortgagor, and the defendant Fisk, who was heir at law to Thomas the elder and younger, and had bought in the equity of redemption. This cause was heard on bill and answer, and it was agreed that both the Fisks left sufficient assets without this mortgage, and the bill was to have the defendant Fisk to assign the mortgage, and have the money paid, or else to foreclose them.

And *it was decreed*, that the defendant Fisk should pay the plaintiff his principal, interest and charges to a day, or else assign the mortgage, and be foreclosed; but my LORD COMMISSIONER TREVOR said, if the mortgagee had been in possession, and died so, he would not have taken the mortgage from the heir, there being no defect of assets.

NOYS v. MORDANT.

HIGH COURT OF CHANCERY, 1706.

(Finch, *Pre. Ch.* 265.)

A., being in possession of an estate that was a mortgage in fee, by will devises it to his daughters B. and C. and their heirs, and dies; B. marries and dies; the question was, Whether the share of B. should be decreed real or personal estate, and consequently go to her heir, or to her husband as her administrator?

MY LORD KEEPER decreed it against the husband, and put this case: A man seised of lands in fee, which were only mortgaged to him, devises them to his son and heir, and his heirs; surely these lands shall descend as an inheritance; or, though the mortgage be paid off, shall not the money be considered as lands, and go to the heir, and his heirs, as the lands would have done, and this purely by the intention of the testator? And did not the testator, who had a governing power, intend, in the present case, that the mortgaged lands should be considered as any other lands of inheritance, and be subject to, and directed by, the same rules that other estates are?¹

BURDEN v. KENNEDY.

HIGH COURT OF CHANCERY, 1757.

(3 A/k. 739.)

LORD CHANCELLOR [HARDWICKE]. Where an execution by *degit* or *fieri facias* is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time; and if the debtor subsequent to this makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will

"And in this case it was declared by the *Lord Chancellor* [Nottingham] that always when a mortgagee dies and makes no devise of the lands he has in mortgage, they shall go to the executor. And in London there is this special custom, that lands in mortgage are always reckoned the personal estate of the mortgagee, he being a citizen."—*Winn v. Littleton*, 1 Vern. 3 (1681).

be intitled at law to the possession, notwithstanding such assignment.

But in the present case here is only an equity of redemption in the debtor in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee; and consequently, by the common equity of this court, he may come here to redeem a subsequent incumbrancer, and likewise to discover whether there was any and what consideration for the assignment.

BURGESS v. WHEATE, 1 Eden, 177, 239, 255 (1759). THE LORD KEEPER [HENLEY]. The question upon the information in this case is whether, the *cestuy que trust* dying without heirs, the trust is escheated to the crown, so that the land may be recovered in a court of equity, or whether the trustee shall hold the land for his own benefit. . . .

It is said the king upon a legal estate shall be liable to an equity of redemption. I do not know that it has ever been so determined. Lord Hale thought the king should, because it is an ancient right which the party is entitled to in equity. Baron Atkins thought the same, because he saw the same equity against the crown as against a common person. Yet it is observable, that there is in that case (*Pawlett v. Attorney General*)¹ a recognition of the equity without any declaration of the remedy. Whether this remedy has since been settled in the Exchequer, where alone it can, I really do not know: but I hope it is so settled; for I see a great deal of equity to support the opinion of Hale and Atkins. A mortgage is an assignment on condition. The condition being performed, the conveyance is void *ab initio*. Equity dispenses with the time, and when the money is paid, the conveyance is void in equity and conscience. I would by no means have it understood that I think there is any equity that the crown cannot avail itself of; and I hope that there is no equity that the subject is not entitled to against the crown. But I own, upon very diligent inquiry and consideration of the case, I at present think the arms of equity are very short against the prerogative.

The next is an objection by inverting the case of a mortgage; and it is asked, suppose the mortgagor die without heirs, shall the mortgagee hold it free of redemption? I suppose the meaning of that question is, shall not the lord have the equity of redemption? or else it is nothing to the present purpose. If that be the question, it seems to me to be the same with the present, and admits of the same answer; the lord hath his tenant and services in the mortgagee, and

¹ Hardres, 465.

he has no right to anything more. Perhaps it would not be difficult to answer what would be the justice of that case, but it is not to the business in hand.¹

MCMURPHY v. MINOT.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1827.

(4 N. H. 251.)

This was an action of covenant broken, on an indenture made the 12th July, 1811, by which the plaintiff demised to Seth Daniels a certain tract of land to hold during her natural life, and the said Daniels covenanted with the plaintiff to pay her, on the first day of May, annually, a rent of \$30. The action was brought against the defendant, as assignee of Daniels, for the said rent from 1st May, 1817, to 1st May, 1825, and was submitted to the decision of the court upon the following statement of facts:

The indenture was made as stated in the declaration and Daniels, having entered under it, afterwards conveyed all his estate to one Gilman Dudley, who, on the 3d April, 1822, conveyed the land to the defendant in fee and in mortgage. Dudley remained in possession and took the profits until his death in October, 1822, and after his decease his administratrix remained in possession, taking the

¹ "Twas said, if a mortgagor die without heir, shall the mortgagee hold the land free? [I answer, shall it escheat to the crown?] No, because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the crown has not an equity on which to sue a subpoena."—*Per Henley*, Lord Keeper, s. c. 1 W. Bl. 155.

"Then it was said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely? And if he demands his money too of the personal representatives, shall he have both land and money? If the mortgagor dies without heir or creditor, I see no inconvenience if the mortgagee held it absolutely. In the case of a forfeiture for treason, it is certain the crown may redeem, as in Sir Salathiel Lovel's case. And as to the supposition that the mortgagee may demand his money too, that must be where the mortgagor dies without heir; therefore the demand must be against the personal representatives, by virtue of some bond or covenant for payment of the money. And if the mortgagee took his remedy against the personal representatives, I think the court would compel the mortgagee to re-convey; not to the lord by escheat, but to the personal representative, and, if necessary, would consider the estate re-conveyed, as coming in lieu of the personality, and as assets to answer even simple contract creditors. Under these circumstances, where is the great inconvenience?"—*Per Sir Thomas Clarke*, M. R., s. c. 1 Eden, 210.

profits until April, 1824. On the 16th April, 1824, a tenant entered upon part of the land under an agreement with the defendant to pay rent to him in case the land was not redeemed. On the 23d April, 1825, the administratrix of Gilman Dudley conveyed to the defendant the right in equity to redeem the land mortgaged as aforesaid, and the defendant's said tenant has been in possession of the whole tract from that time to the commencement of this action on the 22d March, 1826. All the interest which the plaintiff ever had in the land was an estate for her own life, and the reversion was in Daniels.

RICHARDSON, C. J. It has been urged in behalf of the defendant in this case that the plaintiff is not entitled to recover anything, because the rent was never demanded of Minot. The law on this point is well settled. When a lessor proceeds for a forfeiture or to enforce a penalty he must show a demand of a rent on the very day it was payable. But in an action of covenant no demand is necessary (*Remson v. Conklin*, 18 Johns. 447; Com. Dig. Rent., D. 4; *Coon v. Brickett*, 2 N. H. Rep. 163). We are therefore of opinion that this objection to the action cannot prevail.

It has also been urged that this action cannot be maintained, because the particular estate and the reversion having become united in the same person the particular estate is merged and the rent extinguished. Had the rent in this case been incident to the reversion, it is clear that this action could not be maintained (*York v. Jones*, 2 N. H. Rep. 454). But it is well settled that the rent is not inseparably incident to a reversion (Co. Lit., 143 and 47a; 2 Bl. Com. 176). Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion. The case of *Webb v. Russell*, 7 D. & E. 393, which has been cited by the defendants' counsel does [not] apply in this case. It was there held where rent is incident to a particular reversion, when that particular reversion is merged, the rent is extinguished. But in this case the rent was never incident to the reversion. The plaintiff granted her whole estate, reserving a rent, and she had no reversion to which it could be incident. In order to maintain this ground it must be shown that when he who has a reversion takes a lease of the particular estate and covenants to pay rent, such rent is extinguished by the union of the particular estate and the reversion. But this proposition cannot be sustained by any reason or authority, and we are of opinion that this ground of defence fails altogether.

But it is further contended on the part of the defendant that being only a mortgagee he cannot in any event be held liable for the rent until he took possession under the mortgage, and the case of *Eaton v. Jaques*, Doug. 438, is cited as an authority. But that decision has been long questioned (7 D. & E. 312), and in 1819 the

question came before all the judges of England, and a great majority were of opinion that when a party takes an assignment of a lease by way of mortgage as a security for money lent, the whole interest passes to him and he becomes liable on the covenant for the payment of rent, though he has never occupied or become possessed in fact (*Williams v. Bosanquet et al.*, 1 Brod. & Bing. 72).

In this State it has been repeatedly decided that a mortgage in fee vests in the mortgagee the whole legal estate; the necessary consequence of which seems to be that such a mortgagee must be liable for the performance of covenants running with the land. And we think in this case the defendant is liable for any rent that became due after his mortgage was executed.

In considering this case, the question occurred to us whether the liability of the defendant could be affected by the circumstance that the rent was reserved upon a grant of the freehold, while the conveyance to him was in fee. But we find that it has been decided that covenant will lie against the assignee of part of an estate for not repairing his part, for it is divisible and follows the land (*Cougham v. King*, 2 East, 580; Cro. Car. 222). And we are not able to discover any reason why he who takes a larger estate should not be bound by a covenant running with a less estate which is parcel of a larger.

On behalf of the plaintiff it has been argued that the defendant is liable in this action, not only for the rent which has become due since he became owner of the land, but the rent which became due before that time. The cases which have been cited by the defendant's counsel seem to show that the law is not so. It is another argument in favor of the defendant, that when the action is against an assignee, it is usual to allege in assigning the breach of the covenant, that the breach happened after the assignment (2 Chitt's Pl. 191; Lilly, 134; *Dubois v. Van Orden*, 6 Johns. 105; Carthew, 177; 2 Ventris, 231). It is said in Woodfall, 274 and 278, that an assignee is liable for arrearages of rent incurred before, as well as during his enjoyment; but he cites no case in which it has been so decided, and offers no argument in support of the propositions, and we are of opinion that this is not law, and there must be judgment for the plaintiff for the rent which has become due since the 3d of April, 1822.

Judgment for the plaintiff.

Farmer's Bank v. Mutual Assur. Soc., 4 Leigh. (Va.) 69 (1832); *Mayhew v. Hardesty*, 8 Md. 479 (1855), *accord*. See also *Calvert v. Readley*, 16 How. (U. S.) 580 (1853).

ASTOR v. HOYT, 5 Wend. 603 (1830). Suit in chancery by the landlord of premises in the City of New York to establish his claim to certain monies awarded to the tenant (Madden) as compensation for opening streets through the premises demised. Madden had mortgaged his term to Hoyt, who thus acquired a prior claim to the fund in question. Madden having covenanted in the lease to pay all assessments, the plaintiff seeks to charge the liability for the breach on the mortgagee. The Chancellor (Walworth) having ordered the payment of the fund in court to the defendant, an appeal was taken by the plaintiff to the Court for the Correction of Errors. On the point under consideration the following opinion was rendered (page 613).

SAVAGE, Ch. J. The question then arises, which was principally discussed upon the argument, is the mortgagee to be considered the assignee of the leasehold premises? And if so, is he liable to payment of the damages for the breach of Madden's covenant? That the covenant to pay all assessments is a covenant running with the land, there can be no doubt (5 Co. 25); and that the assignee is liable for the breach of such a covenant occurring while he is assignee, is equally clear; but whether the mortgagee is assignee, and if assignee, whether he is liable for breaches of the covenant before the assignment, are questions to be discussed. In England I think it must be conceded to be settled that where the mortgagor, by the form of the instrument, conveys or assigns by way of mortgage his whole estate, the mortgagee is considered, at law and in equity too, the assignee. We read, indeed, in some of the books that though the mortgage purports to convey an estate defeasible by matter subsequent, yet that the courts of equity consider them, in their true intent, as mere securities for money; but the decision of the courts, both of law and equity, which are the highest evidence of what the law is, have generally considered mortgages as conveyances; and by the mode of drawing them there it seems necessary that when the condition is performed there should be a reconveyance or reassignment. In *Sparks v. Smith*, 2 Vernon, 275, the court refused to compel a mortgagee to disclose whether a lease was assigned to him to enable the plaintiff to prosecute him as assignee upon the covenant of the lessee, who was also mortgagor, clearly implying that as assignee of the whole term, even by way of mortgage, he would be liable; and in *Pilkington v. Shaller*, 2 Vern. 374, where a recovery had been had in a similar case against the plaintiff as assignee, the court refused to relieve him, saying the mortgagee was ill advised to take an assignment of the whole term. In the case of *Eaton v. Jaques*, Doug., 460, the Court of King's Bench disregarded these cases and thought them not well considered. Lord Mansfield was of opinion that upon principle the assignee is liable

only in respect of the possession, and that as a mortgage was a mere security, the mortgagee out of possession was not liable as assignee. About ten years afterwards Lord Thurlow entertained a different opinion, and did what was refused in *Pilkington v. Shaller*. He compelled a person who had received a lease in deposit as security, to take an assignment, that he might be prosecuted as assignee upon the covenant of the lessee to build a house. The question seems to have been finally and deliberately settled in *Williams v. Bosanquet*, 1 Brod. & Bing. 72, by ten judges, overruling the doctrine of Lord Mansfield in *Eaton v. Jaques*. Dallas, Ch. J., in giving the decision of the court, states explicitly the grounds of the decision. He shows from authority that the lessee is liable for the rent, whether he enter or not; he is liable by virtue of his lease, and he argues that the assignee is under the same liability, whether he takes an absolute assignment or only by way of security, for the lessee conveys by the assignment his whole interest, which the assignee takes; and as the lessee was liable before the entry, so must the assignee be liable in like manner. In that case, he remarks, the assignment was of all the right, title and interest of the assignor, and so completely did the interest pass that there was a covenant to reassign upon payment of the money. The money was not paid before the day when, if not paid, the assignment was to become absolute, so that the case was that of an absolute assignment. He also held there was a privity of estate, for the acceptance of the assignment was equal to actual entry, and privity of contract, because contract was with the lessee and his assigns, and the defendants were such assigns; therefore the contract was between the lessor and assignee.

Chancellor Walworth considers the case of *Williams v. Bosanquet* as settling the principle in England that a mortgagee of leasehold premises, whether in possession or not, is liable upon the covenants as assignee, but he thinks such a principle cannot prevail in this State, because we hold the mortgagor to be the true owner, and the mortgagee as having nothing but a chattel interest while out of possession. The counsel for the appellant insists, however, that in that respect there is no difference in the doctrine held in England and here, for Lord Mansfield said in *The King v. St. Michaels*, Doug., 632, it was an affront to common sense to say the mortgagor is not the real owner. Such was indeed the doctrine of Lord Mansfield and of Buller, Justice, but that is the very doctrine that is repudiated in *Williams v. Bosanquet*. Lord Mansfield asserts that the mortgagor is the real owner. Not so, says Ch. J. Dallas, giving the opinion of the ten judges; the whole interest is assigned; it vests absolutely, and is not the less absolute because the assignor (the mortgagor) may entitle himself to a reassignment. Unless, there-

fore, a man can be the real owner after he has parted with all his interest, the chancellor must be right in saying that the English doctrine of the ten judges is inapplicable here. If the law is the same here as in England, and the law there is that the mortgagee out of possession has the whole estate, then this court was in error in the case of *Waters v. Stewart*, 1 Caines' Cas. in Err. 47, where they decided that the equity of redemption remaining in the mortgagor was real estate, and liable to be sold on execution; and the Supreme Court were equally in error when they decided that the mortgagee out of possession had no interest which could be sold on execution (*Jackson v. Willard*, 4 Johns. R. 41), for if he had the whole estate it certainly might be sold. It would seem, too, that Powell must have been under a great mistake when he stated that the mortgagor might levy a fine or suffer a common recovery; that he had an estate which descended to his heirs, and which he might devise by his will (Powell on Mortgages, 75, 76, 170).

Here, however, the mortgagor is the owner against all the world, subject only to the lien of the mortgage. In *McIntyre v. Scott*, 8 Johns. R. 159, it was held that the mortgagee of a ship, out of possession, was not liable for supplies; and in *Runyan v. Mersereau*, 11 Johns. R. 538, the assignee of the mortgagor was permitted to maintain trespass against the mortgagee after condition broken. The court conclude their opinion in that case by saying: "The light in which mortgages have been considered in order to be consistent necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he of course is entitled to judgment." In that case the court rely on the doctrines of Lord Mansfield in *Eaton v. Jaques*, and to show that the interest of the mortgagee is only a chattel interest, they refer to the well-established principles that mortgages pass by a will not made with the solemnities of the statute, and that the assignment of the debt draws the land after it. In *Coles v. Coles*, 15 Johns. R., 320, Spencer, J., repeats the doctrine of *Runyan v. Mersereau*, and in that case it was decided that the wife might be endowed out of equity of redemption. In *Hitchcock v. Harrington*, 6 Johns. R. 295, Kent, Ch. J., says of the mortgage: "We now regard the mortgage estate only for the benefit of the mortgagee and his assigns. As to the rest of the world, as long as it is not put in force, it is only a pledge or lien on the bond, with which they have no concern any further than not to disturb it." And in *Dickinson v. Jackson*, 6 Cowen, 147, we held that until default in payment of the money due by the mortgage, or some part thereof, and the termination of a notice to quit, the mortgagee has no right of entry as against the mortgagor and cannot bring ejectment against him, though he may against the assignee of the mortgagor, the tenancy being broken by the assignment. It is too

late for us now to retrace our steps and adopt the doctrine of *Williams v. Bosanquet*, even if it was correct. To recover against an assignee of the lessee it must be averred and proved that all the right, title and interest of the lessee passed by assignment to the assignee. After these decisions, can we say that all the right, title and interest of the mortgagor has passed to the mortgagee out of possession? So far from it, we hold that the mortgagee, before foreclosure or the commencement of proceedings to foreclose, has but a chattel interest. It is perfectly clear, therefore, that a mortgagee of a term out of possession is not in this State to be considered the assignee. In England there must be a reconveyance or re-assignment; so say the court in *Williams v. Bosanquet*. Here that is not necessary; the transfer of the debt transfers the mortgage; payment extinguishes the lien, and so does a tender. But if a mortgagee takes possession of the mortgaged premises lawfully, he must be then considered assignee, and the assignee must take the estate *cum onere*. When the mortgagee takes possession, he then has all the right, title and interest of the mortgagor; then he acquires and the mortgagor loses an estate liable to be sold on execution. He is therefore substituted in the place of the mortgagor, who was lessee, and therefore is assignee and liable as such.

If I am correct in the positions, that a portion of the fund in court is to be considered the representative of the premises taken for the street, and that the mortgagees, taking possession of either the premises or the substitute, became liable for such covenants as run with the land, and that this covenant to pay assessments is of that character, it seems to follow that the mortgagees in this case must be responsible for their proportion of the assessment, unless, as they allege, the breaches occurred previous to the assignment.¹

HUNTINGTON v. SMITH.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1822.

(4 Conn. 235.)

This was a *scire facias*, stating, That by the consideration of the county court for Litchfield County, held at Litchfield, on the fourth Tuesday of March, 1817, the plaintiff recovered a judgment against

¹ That a mortgage of a term does not constitute a breach of a condition not to assign, is law in England as well as in the United States. *Doe v. Hogg*, 4 Dowl. & Ry. 226 (1821); *Riggs v. Parsell*, 66 N. Y. 193 (1876).

the defendant and one Miles Tobey for the sum of 216 dollars, 43 cents, and had execution for the same; which execution the plaintiff put into the hands of William P. Russell, a deputy sheriff, to execute; who, on the 18th of May, 1817, levied the same upon a piece of land in Norfolk, particularly described in his return, supposing it to be the property of the defendant, and caused it to be appraised and set off on the plaintiff's execution in full satisfaction thereof; but the defendant had, in fact, no right nor interest in such land, it being then owned and possessed by one James Rood; the plaintiff's execution has never been paid or satisfied; and Tobey having died, the debt survived against the defendant. The plaintiff, therefore, prayed that an *alias* execution might issue on the judgment.

The defendant pleaded, 1st, That the land mentioned in the *scire facias*, as being levied upon, appraised and set off on the plaintiff's execution, was land in which the defendant had an interest as mortgagee in fee, and the time limited for the redemption thereof by the mortgagor had expired; 2ndly, That after the rendering of said judgment and the issuing of said execution, viz. on the 19th of May, 1817, Tobey executed and delivered to the plaintiff his two promissory notes, one for the sum of 60 dollars, payable on demand with interest, the other for 156 dollars, 43 cents, payable on the 1st of January, 1818, with interest, being the amount of said judgment and execution, which notes the plaintiff received in full satisfaction of said judgment and execution. These pleas were traversed by the plaintiff; on which issue was joined.

The facts proved on the trial were these: Russell, the officer in whose hands the execution was, took the notes of Tobey mentioned in the defendant's plea, in pursuance of an understanding between the plaintiff and Tobey, on the condition that he, Russell, should hold them until the plaintiff should execute and deliver to Tobey a quit-claim deed of the land on which the execution should be levied, when they were to be delivered to the plaintiff. Tobey directed the officer to levy the execution on the land mentioned in the *scire facias*, which he did, and had it appraised and set off to the amount of the execution and the costs. In this land the defendant had the estate of a mortgagee in possession, the law-day having expired but no decree of foreclosure having been passed. In the fall after the levy, Tobey died, and his executors directed the officer not to give over the notes to the plaintiff. The plaintiff did not get the deed and deliver it for Tobey's use before his death. The notes still remain in the officer's hands.

The case thus made was reserved, by consent of parties, for the advice of all the Judges.

P. Smith, for the defendant, contended, 1. That the interest of

a mortgagee in mortgaged premises may be taken in execution (8 Mass. Rep. 565; *Punderson v. Brown*, 1 Day's Rep. 98; *Judah v. Judd*, 1 Conn. Rep. 309; 2 Swift's Syst. 429). 2. That Tobey's notes were delivered not as escrows, but in satisfaction of the judgment and execution. Neither Tobey nor his executors had any controul over them afterwards. The plaintiff may at any time get possession of them by delivering his deed, and may maintain suits upon them. Notes delivered to a third person to be delivered over to the payee on a certain event take effect from the first delivery, and are held in trust for the payee (*Wheelright & al. v. Wheelright*, 2 Mass. Rep. 452, 454).

S. Church and *L. Church*, for the plaintiff, contended, 1. That the interest of the mortgagee, before foreclosure or entry, is a mere chattel interest, and cannot be levied on as his land. The land belongs to the mortgagor, and may be taken in execution as his real estate, subject to the incumbrance (*Blanchard v. Colburn & ux.*, 16 Mass. Rep. 345; *Jackson d. Norton and Burt v. Willard*, 4 Johns. Rep. 41). 2. That Tobey's notes were no bar to this application. First, there was no agreement to receive them in satisfaction of the execution. Secondly, they were never delivered so as to become effective instruments. [Upon the statement of these propositions, the Court stopped the counsel for the plaintiff.]

HOSMER, Ch. J. On the first plea in the case before us, the only question is whether after the expiration of the law-day, and before an entry or foreclosure, the interest of a mortgagee in the premises mortgaged may be set off on execution.

The fee simple of the land mortgaged is in the mortgagor; and the mortgagee, before entry or foreclosure, has, at most, a chose in action, and a right to the possession, in order to render the mortgage available to the payment of his debt. The mortgage is an incident only to the debt, which is the principal; it cannot be detached from it; distinct from the debt, it has no determinate value; and the assignee must hold it at the will and disposal of the creditor who has the note or bond, for which it is a collateral security. The debt may require only a small part of the land to satisfy it; and by the levy of several executions, the mortgagor, desiring to redeem, may be much embarrassed. The land cannot be taken for the debts of the mortgagee until his entry upon it, and, in my opinion, until foreclosure. These principles are so thoroughly established, and so frequently has it been decided directly that mortgaged premises not entered upon by the mortgagee or foreclosed, cannot be taken for his debts, that a more extensive investigation of the subject is unnecessary (*Fish v. Fish*, 1 Conn. Rep. 559; *Portland Bank v. Hall*, 13 Mass. Rep. 207; *Blanchard v. Colburn & al.*, 16 Mass. Rep. 345; *Jackson v. Willard*, 4 Johns. Rep. 41; *Jackson v. Dubois*,

4 Johns. Rep. 216; *Hitchcock v. Harrington*, 6 Johns. Rep. 290; *Collins v. Torry*, 7 Johns. Rep. 278).

The second plea was, that certain promissory notes were accepted by the plaintiff, in full satisfaction of the judgment and execution mentioned in his declaration. The proof exhibited evinces that the notes were escrows and not to be delivered until the execution of a deed on the plaintiff's part (*Jackson v. Catlin*, 2 Johns. Rep. 248, 259; *Lansing v. Gaine & Ten Eyck*, 2 Johns. Rep. 300, 306; *Catlin v. Jackson* in err., 8 Johns. Rep. 520), and that they never were delivered. It is an undoubted consequence that they could not have been accepted in satisfaction.

Neither plea has been supported, and I would advise that the plaintiff have judgment.

The other judges were of the same opinion.

Judgment to be rendered for the plaintiff.

EATON v. WHITING, 3 Pick. 484 (1826).—PARKER, C. J. The opinion expressed in the case of *Blanchard v. Colburn*, 16 Mass. Rep. 345, that the interest of a mortgagee in real estate mortgaged to him for security of a debt, or the performance of a condition, is not liable to be levied upon for the debts of the mortgagee and so, of course, is not liable to attachment on *mesne* process, we see no cause to change. It is in fact but a chose in action, at least until entry to foreclose, and although the legal effect of the mortgage is to give an immediate right of entry or of action to the mortgagee, yet the estate does not become his, in fact, until he does some act to divest the mortgagor, who, to all intents and purposes, remains the owner of the land until the mortgagee chooses to assert his right under the deed. It is, as before said, in the nature of a pledge, and a pawn or pledge cannot be seized in execution for the debt of the pledgee. The mortgagor may be compelled to pay over the debt to the creditor of the mortgagee on the trustee process, with the same exceptions as are provided for other cases, and payment under such process will discharge the mortgage *pro tanto*; so that the creditor of the mortgagee is not without remedy, as has been suggested. The law in New York and Connecticut is the same as with us. In the courts of both those States it has been decided that a mortgagee before entry has not such an interest in the land as can be sold, levied upon, or attached. See *Jackson v. Willard*, 4 Johns. Rep. 41; *Runyan v. Mersereau*, 11 Johns. Rep. 534; *Johnson v. Hart*, 3 Johns. Cas. 329; also *Huntington v. Smith*, 4 Conn. Rep. 237, in which Hosmer, C. J., states at large the reasons similar to those given in *Blanchard v. Colburn* by this court. Before the case of

Blanchard v. Colburn the same principle had been decided in the case of *Portland Bank v. Hall*, 13 Mass. Rep. 207. So that we are warranted in considering it as settled law, that the interest of a mortgagee before entry is not attachable;¹ and we might add with Hosmer, C. J., in the case cited from the Connecticut Reports, that we doubt whether it is attachable before foreclosure, for until then all the inconveniences suggested as the ground of decision would occur.²

TRIMM v. MARSH.

COURT OF APPEALS OF NEW YORK, 1874.

(54 N. Y. 599.)

Appeal from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon the decision of the court at Special Term, and ordering a new trial. (Reported below, 3 Lans. 509.)

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the possession of the mortgaged premises, upon payment of the amount due.

In 1858 one Ridgway, being the owner of certain premises situate in the City of New York, mortgaged them to an insurance company to secure \$2,000; the insurance company assigned the mortgage to the defendant, Sarah A. Marsh. Ridgway afterward conveyed the premises to the plaintiff, Brown, who subsequently, in October, 1865, entered into an agreement with plaintiff, Trimm, to convey the same to him. In 1861 the defendant, Sarah, commenced an action to foreclose this mortgage, making plaintiff, Brown, and others parties, and obtained judgment of foreclosure. The premises were sold under the judgment in 1862, and defendant, Sarah A. Marsh, became the purchaser, and received a sheriff's deed. Immediately after the sale she entered into possession of the premises, and she or the other defendant has ever since been in possession. In October, 1864, by an order of the Supreme

¹ Judge Trowbridge was of a different opinion (*vide* 8 Mass. Rep. 563), and much respect is due to him. But the law respecting mortgaged estates has been changed by the legislature since his time, it being enacted by the statute of 1788, c. 51, that such estates shall be assets in the hands of executors and administrators, and be distributed as personal estate.—*Per* Parker, C. J., in *Blanchard v. Colburn*, 16 Mass. 345 (1820).

² *Robert v. Madeira*, 1 Rawle (Pa.) 325 (1829); *Nicholson v. Walker*, 4 Bradw. (Ill.) 404 (1879), *accord*. So are the authorities generally.

Court, granted after due notice and hearing the parties interested, the foreclosure sale was set aside and declared null and void, and a resale was ordered, which never took place. In November, 1864, the defendant, Sarah A. Marsh, recovered a judgment against plaintiff, Brown, which was duly entered and docketed, and in 1865 she caused an execution to be issued upon said judgment to the Sheriff of New York, who, in May of the same year, sold all "the right, title and interest" of which the said Elizabeth C. Brown was seized or possessed in the said land, the said Sarah A. Marsh becoming the purchaser and taking the sheriff's certificate of sale. In September, 1865, she conveyed the said premises by deed to the other defendant, and in September, 1866, after the commencement of this suit, she also transferred to him the sheriff's certificate, and he soon after received the sheriff's deed. The defendant, William B. Marsh, had notice of all the facts when he took his title, and was not a *bona fide* purchaser for value. Since the defendants went into possession of the premises they have assumed and claimed an absolute title, free from any right of redemption in the plaintiffs or either of them.

The plaintiffs commenced this action to redeem the said premises from the mortgage and judgment of foreclosure, and the principal defence relied on by the defendants was their title under the judgment and execution sale against plaintiff, Brown. The referee decided the same in favor of plaintiffs, holding that the execution sale, being made by the assignee of the mortgagee in possession, was null and void and conferred no title upon the purchaser.

Wheeler H. Peckham for the appellants.

Justus Palmer for the respondent.

EARL, C. The only legal proposition involved in this case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the General Term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal

estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor Kent says that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law" (4 Kent's Com. 158).

The common-law rule, as modified by the equitable principles above alluded to, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and many of the other States of the Union. But this common-law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature (*Waters v. Stewart*, 1 Caines' Cases in Error, 47; *Jackson v. Willard*, 4 Johns. 42; *Runyan v. Mersereau*, 11 *id.* 534; *Astor v. Hoyt*, 5 Wend. 603; *Packer v. Rochester & Syracuse Railroad Co.*, 17 N. Y. 283-295; *Kortright v. Cady*, 21 *id.* 343; *Power v. Lester*, 23 *id.* 527; *Merritt v. Bartholick*, 36 *id.* 44).

Prior to the Revised Statutes the mortgagee could maintain ejectment to recover the mortgaged premises. This right has been taken away (2 R. S. 312), and now the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure. It is not disputed that before possession taken by the mortgagee the mortgagor has an interest in the real estate which can be sold upon execution; that his widow is entitled to dower; that he can convey and devise his interest as real estate; that at his death it descends to his heirs; that he has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and that his title can be defeated only by foreclosure. It is not disputed that the mortgagee before possession taken has only a chose in

action: that he holds the mortgage only as security for the debt; that he can sell the bond and mortgage by mere delivery as personal property; that at his death they pass to his personal representatives as a portion of his personal estate; that he has no such estate in the land as can be sold on execution, or as he can give his widow dower; and that he has no attribute of ownership in the land. It was said by Judge James, in *Power v. Lester* (*supra*), that "a mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on an execution." Judge Pratt says, in *Packer v. The Rochester & Syracuse Railroad Company* (*supra*), that "a mortgagee has a mere chose in action, secured by a lien upon the land. Since the Revised Statutes there is no attribute left in the mortgagee, before foreclosure, upon which he can make any pretense for a claim of title. For the mere right, when he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title. He would have the same right in case of a pledge."

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a reconveyance was necessary; and such is still the rule in England and in many of the States of the Union. But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as expounded by our courts. So that here the term law day, which occupies such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes, which prohibits an action of ejectment by the mortgagee

to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the lands. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as his security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge Comstock, in *Kortright v. Cady* (*supra*), says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in the land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but where its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such a case, the mortgagee has also such an estate in the land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by the possession. He has no interest in the real estate which he can sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take

it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity (*Merritt v. Bartholick*, *supra*).

The fact that at the time of the execution sale, the defendants were in possession, claiming the absolute title, can make no difference, as land held adversely to the true owner can be sold upon execution against him (*Tuttle v. Jackson*, 6 Wend. 213; *Truax v. Thorn*, 2 Barb. 156).

I am, therefore, of the opinion that the title of the defendant under the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the General Term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs.^{1, 2}

TEFFT v. MUNSON.

COURT OF APPEALS OF NEW YORK, 1875.

(57 N. Y. 97.)

Reported, page 139, *supra*.

RECTOR CHRIST CHURCH v. MACK.

COURT OF APPEALS OF NEW YORK, 1883.

(93 N. Y. 488.)

Appeal from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made

¹ The concurring opinion of Reynolds, C., as well as the elaborate dissenting opinion of Gray, C., arguing for the legal character of the mortgage estate, especially after default and entry, is omitted.

This case represents the general rule in the United States. But see *Van Ness v. Hyatt*, 13 Pet. 294 (1839), for the doctrine of a stranded jurisdiction.

² NEW YORK CODE CIV. PROC. § 1432. The judgment debtor's equity of redemption in real property mortgaged shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt or any part thereof.

October 28, 1881, which reversed a judgment in favor of defendant Rhoda E. Mack, entered upon a decision of the court on trial at Special Term, and directed judgment for plaintiff for the relief demanded in the complaint. (Reported below, 25 Hun, 418.)

This action was brought to restrain defendants from obstructing the light and air from the windows of plaintiff's church edifice, adjoining a lot owned by said defendant, Rhoda E. Mack. Plaintiff was formerly owner of said lot, which was subject to a mortgage given to one Bell. It conveyed the same to defendant, John Mack, subject to the mortgage, which the grantee assumed and agreed to pay. By the deed an easement was reserved of light and air to the grantor's church so long as its premises were used for church purposes. Mack conveyed to a third person, who, on the same day, conveyed to Rhoda E., wife of said John Mack. Her deed was made subject to the Bell mortgage, but contained no assumption of the same by her. The holder of the mortgage, at the request of defendants herein, foreclosed the mortgage by suit; plaintiff was made a party defendant therein. Judgment of foreclosure in the ordinary form was entered, and upon the sale under it Mrs. Mack became the purchaser and received the referee's deed. Mrs. Mack thereafter erected a fence upon her lot, which cut off the light from the basement windows of plaintiff's church.

E. C. Boardman for appellants.

Wheeler H. Peckham for respondents.

FINCH, J. It is conceded that a purchase under the foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relation to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed," and further declares that such deeds shall be as valid as if executed by the mortgagor and mortgagee. The construction to be put upon these two provisions was early settled in this court (*Brinard v. Cooper*, 10 N. Y. 358; *Packer v. The Roch. & Syracuse R. R. Co.*, 17 *id.* 287). In the last of these cases it was said that where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity, and that the foreclosure cuts off and extinguishes that equity, and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and that in construing the statute its two clauses were to be read in harmony. It was, therefore, decided that

when the act says the master's deed "shall have the same validity as if executed by the mortgagor, it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and the foreclosure." While it is clearly the modern doctrine that the mortgagee has by virtue of his mortgage no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (*Ten Eyck v. Craig*, 62 N. Y. 421), and only acquires such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgagee. The effect of the foreclosure deed, therefore, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving an easement in the lot for light and air to their adjoining windows, they held their easement, and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule.

The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser whose title is described and determined, and we have no warrant in the facts to take Mrs. Mack out of the statutory protection.

The argument of the General Term and of the learned counsel for the respondent on this appeal were both aimed at the result of converting her purchase into a mere payment and discharge of the mortgage lien, and her deed into a release of the incumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us

a misinterpretation of the second clause. In brief, the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed and his title, incumbered by an after constituted easement, had reached Mrs. Mack; that she could not be said to purchase what she already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with its after incumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him but only the right of the mortgagee. The mortgagor had the absolute title incumbered only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took, and therefore did not get the entire interest which the mortgagor himself had. There was something which she had not got, which by a foreclosure of the Bell mortgage would pass, and which it was possible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land and cannot by neglecting their payment and causing a sale and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the incumbrance. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into

court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree and, showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed and that of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.

CHAPPELL v. JARDINE.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1884.

(51 Conn. 64.)

Suit for a foreclosure; brought to the Superior Court. The defendants demurred to the complaint; the court (Andrews, J.) overruled the demurrer and passed a decree of foreclosure. The defendants appealed to this court. The case is sufficiently stated in the opinion.

J. M. Thayer and *C. F. Thayer* for the appellants.

J. Halsey and *W. A. Briscoe* for the appellee.

PARK, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged at the time the deed was given lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (*Elphick v. Hoffman*, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two

States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-existing boundary line which had become lost, and not as the establishment of a new line, leaving the matter open to proof in special cases. If we should apply that rule here, and consider the island in question as having been legally a part of this State when the mortgage was made, we should at once encounter another question of a serious nature. There can be no question that whatever has been the *de jure* jurisdiction over the island, it has been for many years within the *de facto* jurisdiction of the State of New York; and we should be compelled to determine the legal effect upon this mortgage of that *de facto* jurisdiction.

We have thought it as well, therefore, to take the case as the parties have themselves presented it, the plaintiff by the averments of his complaint and the defendants by the admissions of their demurrer, and regard the island in question as having been within the State of New York when the mortgage was made, and afterwards brought within this State by the establishment of the boundary line. Indeed, as the proceeding is in error, we cannot properly govern ourselves by anything but the record as it comes before us. And in treating the island as within the State of New York when the mortgage was made we are regarding the contract and the rights of the parties under it, precisely as they themselves understood them at the time.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick v. Sullivant*, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat. 365; *Darby v. Mayer*, 10 *id.* 165, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases.

In *Gardner v. Hearst*, 3 Denio, 232, the court say: "The mort-

gagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; the title to the land, notwithstanding the mortgage, remains in the mortgagor." In *Power v. Lester*, 23 N. York, 527, the court say: "A mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on execution." In *Trimm v. Marsh*, 54 N. York, 599, the court say: "The common law rule . . . still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become re-invested with the title to his land only by a re-conveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. . . . At common law payment or tender at the law day extinguished the lien of the mortgage and re-invested the mortgagor, without a re-conveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case a conveyance was necessary; and such is still the law of England, and of many of the States of the Union. But it has always been the law of this State that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a re-conveyance was not required by the law as expounded by our courts. So that here the term 'law day,' which occupies such a prominent place in the early decisions as to mortgages, has no particular significance. The mortgagor has his 'law day' until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption, a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate." See also *Jackson v. Willard*, 4 Johns. 42; *Astor v. Hoyt*, 5 Wend. 603; *Kortright v. Cady*, 21 N. York, 343; *Merritt v. Bartholick*, 36 *id.* 44.

It follows, therefore, that while the land in question remained in the State of New York it was incumbered by a mortgage of this character; and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgagee if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect (*Phelps v. Sage*, 2 Day, 151; *Roath v. Smith*, 5 Conn. 136; *Chamberlin v. Thompson*, 10 *id.* 244; *Porter v. Seeley*, 13 *id.* 564; *Smith v. Vincent*, 15 *id.* 1; *Dolon v. Russell*, 17 *id.* 146; *Cross v. Robinson*, 21 *id.* 379; *Dudley v. Caldwell*, 19 *id.* 218; *Caldwell v. Warner*, 36 *id.* 224).

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would

be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In this opinion the other judges concurred.

DOLLIVER v. ST. JOSEPH INSURANCE Co., 128 Mass. 315 (1880). A mortgagor of real property insured the same under a policy, wherein he represented himself as having "the entire, unconditional and sole ownership" of the property. It was held that there was no misrepresentation.

SOULE, J. It has long been settled in this Commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession (*Willington v. Gale*, 7 Mass. 138; *Waltham Bank v. Waltham*, 10 Met. 334; *White v. Whitney*, 3 Met. 81; *Ewer v. Hobbs*, 5 Met. 1; *Henry's case*, 4 Cush. 257; *Howard v. Robinson*, 5 Cush. 119; *Buffum v. Bowditch Ins. Co.*, 10 Cush. 540; *Farnsworth v. Boston*, 126 Mass. 1). This being the law, and the

mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere incumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.¹

CHAPTER I. (*Continued.*)

SECTION II. POSSESSION.

SMARTLE V. WILLIAMS.

COURT OF KING'S BENCH, 1694.

(*Salkeld*, 245.)

On a trial at bar the case upon evidence was: a man made a mortgage for years to A., who without the mortgagor's joining assigned it to B., who assigned to C., under whom the plaintiff in ejectment claimed; and it was objected by Levinz, that though he admitted the first mortgagee might well assign without making any entry or joining the mortgagor, who is but tenant at will to the mortgagee, and his possession as such is but the possession of his mortgagee, yet the assignment of the first mortgagee determined the lease at will, and the mortgagor thereby became tenant at sufferance, and his continuance in possession divested the term and turned it to a right, so that it could not be assignable without B.'s entry on the mortgagor's joining; that it was at least a divesting of the term at the election of the assignee according to *Blunder* and

¹ Compare *Blaney v. Beare*, 2 Greenl. (Me.) 132 (1822).

Daw's case, 1 Cro. 305. And B. the assignee had made his election and brought an ejectment against the mortgagor, which admitted his being out of possession; and they shewed the record itself, wherein the assignee was lessor of the plaintiff. *Sed per* HOLT, C. J. Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will, and the assignments of the mortgagees could only make the mortgagor tenant at sufferance, but his continuing in possession could never make a disseisin, nor divesting of the term; otherwise if the mortgagor had died and his heir had entered, for the heir was never tenant at will, but his first entry was tortious; or if the mortgagee had entered upon the mortgagor and the mortgagor had re-entered, for the mortgagee's entry had been a determination of the will, and the re-entry of the mortgagor had been merely tortious. And as to the bringing an ejectment, it was said, that could not admit an actual divesting, so as to turn the term to a right, for that was not brought to recover the mortgage-term but the actual possession only, for the recovery of which the assignee of the first mortgage had no other way but this, or to make a forcible entry, which the law forbids; nor does the assignee appear a party to the record, but only a lessor of the plaintiff, so that this record can be no evidence or estoppel against him, and the court will take notice that an ejectment is only a fictitious proceeding for recovering the possession which cannot well otherwise be obtained; and the entry laid in the declaration or confessed by the defendant, is not an entry that is real, for it shall neither avoid a fine, nor be sufficient evidence to support trespass for the mean profits.¹

KEECH v. HALL.

COURT OF KING'S BENCH, 1778.

(1 *Douglas*, 21.)

Ejectment tried at Guildhall before Buller, Justice, and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider; and now Lord Mansfield stated the case and gave the opinion of the court, as follows:

LORD MANSFIELD. This is an ejectment brought for a warehouse in the city by a mortgagee against a lessee under a lease in writing for seven years, made after the date of the mortgage by the mort-

¹ *Hall v. Doe d. Surtees*, 5 B. & Ald. 687 (1822), *accord*.

gagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the court to decide is whether, by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor and wrongdoer.

No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belchier v. Collins*); but there the mortgagee was privy to the lease, and afterwards, by a knavish trick, wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration, we are all clearly of opinion that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the

mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage, for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure when he takes a lease should inquire after and examine the title deeds. In practice, indeed, (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title.

It was said at the bar that if the plaintiff, in a case like this, can recover, he will also be entitled to the *mesne* profits from the tenant in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment.

The Solicitor-General for the defendant.

Dunning and *Cowper* for the plaintiff.

The rule discharged.

MOSS v. GALLIMORE.

COURT OF KING'S BENCH, 1779.

(1 *Douglas*, 279.)

In an action of trespass, which was tried before Nares, Justice, at the last Assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court on a case reserved. The case stated as follows: One Harrison, being seised in fee, on the 1st of January, 1772, demised certain premises

to the plaintiff for twenty years, at the rent of £10, payable yearly on the 12th of May; and, in May, 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28 which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, shewed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz. on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c. by virtue of an authority, &c. for the sum of £28, being rent, and arrears of rent, due to the said Ester Gallimore, at Michaelmas last past, for, &c. and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of £22 2s. The question stated for the opinion of the court was Whether, under all the circumstances, the distress could be justified?

Wood for the plaintiff. The plaintiff's case rests upon two grounds: 1. The defendant, Gallimore, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due and payable in May. 1. Before the statute of 4 Anne, c. 16, § 9, a conveyance by the reversioner was void without the attornment of the tenant (*Co. Litt.* 309, *a, b*), which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence that a grantee has now a right to distrain before he turns his title into actual possession. The mortgagor (according to a late case [*Keech v. Hall, supra*, M. 19, Geo. 3, p. 21]) is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing in this case can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made

became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as Gallimore, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear from the case that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of William and Mary (2 W. & M. sess. 1, cap. 5, § 2), but it is thereby required, that notice shall be given thereof "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 Geo. 2, cap. 19, § 19, does not make the defendants trespassors *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity. Lord Mansfield observed that the plaintiff was precluded by the case from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only whether the distress was justifiable; and Buller, Justice, said that it was not necessary by the statute of William & Mary, to set forth in the notice at what time the rent became due.

Bower for the defendants. If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title, like a feoffment and livery, or a fine or recovery, and the deed declaring the uses (*Long v. Heming*, 1 Anders. 256; s. c. Cro. El. 209). Now, however, any doubts there might have been on this subject are entirely removed by the statute of Queen Anne, the words of which are very explicit, viz. (4 Anne, c. 16, § 9), "that all grants or conveyances of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made." The proviso in the same statute (§ 10) which says that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of

the grant, shews that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents by an ejectment against a tenant under a lease prior to the mortgage (*White v. Hawkins*, *supra*, M. 19, Geo. 3, p. 23, Note 7). The interest, it is said, is not stated to have been demanded; but the case states that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said, the tenant could not decide between the mortgagor (or, which is the same thing, his assignees), and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The court told him it was unnecessary for him to say anything on the other point.

LORD MANSFIELD. I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. This, however, is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant and, like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment, but there is a provision, that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has

been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But, having notice from the assignees and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of execution it is uniformly held that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent, which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

ASHHURST, Justice. The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an undertenant; for there can be no such thing as an undertenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

BULLER, Justice. There is in this case a plea of the general issue, which is given by statute (11 Geo. 2, c. 19, § 21), but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements.

Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.

The *postea* to be delivered to the defendants.¹

PARTRIDGE v. BERE.

COURT OF KING'S BENCH, 1822.

(5 B. & Ald. 604.)

Action for diverting a water course. The declaration contained an averment, that a certain close was in the possession and occupation of one John Turner, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff. At the trial before Park, J., at the last assizes for the county of Devon, it appeared that Turner, being tenant for life of the close mentioned in the declaration, in March, 1817, had mortgaged the same to the plaintiff for £100, for a term of years, provided he, Turner, lived so long, and that Turner had since that time continued in possession and paid the interest. It was objected on the part of the defendant that the relation of landlord and tenant did not subsist between a mortgagor and mortgagee, and, consequently, that the averment was not supported by evidence; the learned judge overruled the objection, and now

Adam moved for a new trial, and contended that there was no tenancy, there was no payment of rent, but of interest; and he relied on the opinion of Buller, J., in *Birch v. Wright*, 1 Term. Rep. 382.

PER CURIAM. Here the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who has the legal title vested in him. The former, therefore, is a tenant within the strictest definition of that word.

Rule refused.

¹ In *Birch v. Wright*, 1 T. R. 378, this case was confirmed by the court, and fully re-stated by Buller, J., who declared by Lord Mansfield's desire that his Lordship continued satisfied with the decision. In that case it was determined that the grantee of a reversion, in trust for payment of an annuity, might recover in an action for use and occupation against a tenant from year to year, who came in under the grantor before the grant, all the rent unpaid in his hands at the time of notice of the grant.—Rep.

Thunder v. Belcher, 3 East, 449 (1803), *accord*.

JONES v. CLARK.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1822.

(20 *Johns.* 51.)

In error, to the Court of Common Pleas, or Mayor's Court, of Albany.

The defendants in error brought an action of assumpsit against the plaintiff in error, in the court below, to recover one quarter's rent of a house and lot, formerly owned by Gilbert Stewart, due August 1, 1821. The defendant pleaded the general issue. At the trial, the plaintiffs gave in evidence a written lease of the premises from them to the defendant and Maltby Howel, for one year, ending May 1, 1821, for the rent of 400 dollars, payable quarterly.

M. Howel, a witness for the plaintiff, testified that the defendant took possession of the premises, under the said lease, at its commencement, on the first of May, 1820, and has since continued in occupation thereof. The witness, in answer to a question, which was objected to by the defendant's counsel, but allowed by the court, and the point reserved, said that he joined in the execution of the lease merely as surety for the payment of the rent by the defendant, Jones, and had never occupied the premises. It was proved that, at the expiration of the term, Jones, without the intervention or concurrence of Howel, agreed with Clark, one of the plaintiffs below, to take the premises for another year, at the same rent.

The defendant below gave in evidence a bond of Gilbert Stewart to R. Pratt and W. Durant, for 6000 dollars, payable on the 4th of February, 1821, and a mortgage to them of the premises, dated February 4, 1819, duly recorded; and also a lease from Pratt and Durant, to the defendant, of the premises in question, dated February 7, 1821, for one year, commencing May 1, 1821, at the yearly rent of 400 dollars; which lease contained a clause, by which the lessors engaged to indemnify the defendant against all claims for rent by any other persons; and also a general assignment by Gilbert Stewart of all his property, including the premises in question, to the plaintiffs below, dated August, 1819, in trust for the benefit of his creditors, as specified in the assignment.

A verdict was taken by consent, for the plaintiffs below, for one quarter's rent, subject to the opinion of the court, &c., on which a judgment was, afterwards, rendered by the court below.

H. Bleecker for the plaintiff in error.

Loucks, contra.

SPENCER, Ch. J., delivered the opinion of the court. The points

made by the counsel for the plaintiff in error, are, 1. That there was no sufficient evidence that Jones held under Clark and Stewart.

2. That Howel was an incompetent witness.

3. That the matters shown by the defendant below were a complete defence.

The first and second points may, at once, be disposed of. There was complete evidence of the hiring of the premises by Jones, for the second year. Howel was a competent witness to show that he had no beneficial interest in the expired lease, though the fact itself was no wise material. The cause depends on the third point; and it presents this question, whether a tenant of the mortgagor in possession, and who became such subsequent to the giving the mortgage, can, in a suit by his landlord, the mortgagor, set up as a legal defence, that after the mortgage became forfeited he attorned to the mortgagee and took a lease from him, during the continuance of the lease from the mortgagor. This case has probably been decided in the court below on the authority of the case of *M'Kircher v. Hawley*, 16 Johns. Rep. 289. The principle decided in that case was this: that a mortgagee could not distrain for rent becoming due under a lease made by the mortgagor subsequent to giving the mortgage, because there was no privity of estate or contract between the mortgagee and such a tenant; and we held that, to enable a party to distrain for rent, he must have a concurrent right to maintain an action for the rent; and if there was no privity of contract or estate, an action could not be maintained.

When the plaintiff in error attorned to the mortgagees and took a lease from them, their title to enter under their mortgage was complete; for, the day of payment having passed, the condition was broken, and the estate of the mortgagees was absolute at law. This case, then, presents a very different question from the one decided in *M'Kircher v. Hawley*. There the point was whether the mortgagee could distrain, or, in effect, sue for the rent. Here it is whether the tenant of the mortgagor could not, by his own act and consent, become the future tenant of the mortgagees, without any disloyalty to the mortgagor. "At common law," says Mr. Butler (in note 272 to Co. Litt. 309 a), "attornment signified only the consent of the tenant to the grant of the *seignior*; or, in other words, his consent to become the tenant of the new lord." He goes on to show the operation of the statute of *quia emptores*, and the statute of uses, and the statute of wills, and observes that the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Anne, c. 16, and 11 George II., c. 19. These two statutes have been re-enacted here. The former does not relate to this case, but the latter has an important and decisive bearing upon it. The 28th section of the statute concerning

distresses, rents, and the renewal of leases (1 N. R. L. 443), after reciting that the possession of estates is rendered precarious by the frequent and fraudulent practice of tenants attorning to strangers, by which means landlords and lessors are turned out of possession, and put to the difficulty and expense of recovering possession by suits at law, enacts that every such attornment shall be null and void, and the possession of the landlords or lessors shall not be deemed to be, in any wise, changed by any such attornment; with a proviso that nothing therein contained should extend to vacate or affect any attornment made pursuant to and in consequence of any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or lessor, or to any mortgagee after the mortgage is become forfeited.

The mischief which the statute was intended to remedy was the attornment by tenants to strangers claiming title; and, without the proviso, the construction of the enacting part of the statute would have admitted of no doubt. But, to remove every doubt, the legislature have declared who were not strangers, and to whom the tenant might lawfully attorn; he may attorn to a mortgagee after the mortgage is forfeited. The reason of this is obvious. The mortgagee, as between him and the mortgagor, has the right of entry, and is entitled to the possession of the premises. If, then, the tenant will do voluntarily what the law will coerce him to do, yield up the possession to the mortgagee, it is not an act injurious to the just rights of the mortgagor, nor disloyal towards him. Indeed, the rights of the tenant also require that he should be allowed to do so; for, if he refuses to attorn, he at once subjects himself to eviction and the payment of costs. The statute makes no difference between a tenant to the mortgagor, who becomes so before or after the execution of the mortgage. It applies to every tenant of the mortgagor, without reference to the time when he became tenant. The reason is the same in both cases, and they are both embraced by the proviso of the statutes; and neither of them are within the mischiefs intended by the enacting part of the statute.

Judgment reversed, and a *venire de novo* to be awarded in the court below.¹

¹ *Magill v. Hinsdale*, 6 Conn. 464 (1827), *accord*. Compare *McKircher v. Hawley*, 16 Johns. (N. Y.) 289 (1819), and see *Hogsett v. Ellis*, 17 Mich. 351 (1868), *contra*.

Souders v. Vansickle.

SUPREME COURT OF JUDICATURE OF NEW JERSEY, 1826.

(3 *Halst.* 313 [386].)*Sarton and Vroom* for the plaintiff.*Wall* for the defendant.

The Chief Justice having been concerned as counsel in the cause before he came upon the bench, gave no opinion.

The opinion of the court was delivered by

FORD, J. This writ of error brings up a judgment of the inferior Court of Common Pleas for the county of Hunterdon, in an action on the case by Vansickle and Garrison against Joshua Souders for the enjoyment of certain premises by their permission from May, 1821, to April, 1822. The case was that one John Holmes, the prior owner, had mortgaged the premises in 1817 to Samuel and Joseph Drake for the payment of a sum of money, and after remaining several years in possession, had conveyed his remaining interest in the premises to Maxwell and Conover. These men entered and put Joshua Souders in possession as their tenant. In this state of things the sheriff levied on Maxwell's right in the premises by virtue of an execution against him, and struck it off at public sale, the 11th of May, 1821, to Vansickle and Garrison; on the 21st of July following he made out to them a deed of conveyance. As soon as the right was struck off to Vansickle and Garrison, and before they got a deed, Joshua Souders, the tenant, attorned to them as his landlords and agreed to pay them a stipulated rent. Shortly afterward Samuel and Imlay Drake conceived that as mortgagees they were the persons entitled to have the rent; whereupon they served notice of their mortgage on Souders, the tenant, forbid him to pay the rent to Vansickle and Garrison, his immediate landlords, and required him to pay it to them as holders of the mortgage. This Souders not only agreed to do, but afterward paid it accordingly to the mortgagees on receiving from them an indemnity. The mortgagees, on filing a bill against Holmes, the mortgagor, and making Vansickle and Garrison parties thereto, obtained a decree on the 10th of October, 1821, foreclosing the equity of redemption against all three of them in the Court of Chancery.

On the trial of the cause Vansickle and Garrison proved the occupation of the premises by Souders, under their permission, and his agreement to pay them rent; and then rested their cause. Souders thereupon offered to prove the mortgage, the notice of it served on him by the mortgagees, their demand upon him for the

rent, and his actual payment of it to them. He insisted that he was bound by law, under such circumstances, to pay to the mortgagees, and therefore the payment was a good defence against his landlords. The court being of a different opinion overruled his defence. Whether the mortgagees after such notice or demand could have sued Souders or distrained his goods for the rent, is the main point in dispute.

It was fully settled on satisfactory principles, in the case of *Moss v. Gallimore*, Doug. 269, that a tenant under a lease made prior to the mortgage may be sued or distrained upon by the mortgagee for rent, after notice not to pay it to the landlord. The lease in that case was a few months older than the mortgage; consequently the rent was an incident of the estate; in other words it was a part of the property at the time of the grant, and passed by it to the mortgagee. The mortgagor was estopped by his own deed from claiming rent that he had conveyed away; the mortgagee was the assignee of the rent, and might take it to himself whenever he saw proper. No injury is done in such case to the tenant, who is to pay to the lessor or his assigns, and can pay but once. Moreover it is the duty of a tenant at common law to attorn to the grant of his landlord whenever he makes one. He was compellable to do so till the statute rendered the form of it unnecessary. Since the statute, the court are to consider him as having attorned at the time of the execution of the grant. To attorn is to acknowledge the grantee (that is the mortgagee) as landlord under whom he holds the estate. On this, a liability to him for rent is a matter of course.

But in this case Souders was no tenant at the date of the mortgage nor till many years afterward; he never held under the mortgagor or grantor, nor stood in the relation of a tenant to him; his rent could not have been conveyed by the mortgage as incident to or a part of the estate, because his rent did not exist at the date of the mortgage. As it has no resemblance whatever, therefore, to the case of *Moss* and *Gallimore*, and stands wide of the principle contained in that decision, it cannot be governed by it.

I admit that some authors, treating of mortgagors remaining in possession and making leases subsequent to the mortgage, say that in such case the mortgagee has his option either to treat such tenants as wrongdoers and turn them out by ejectment, or to recover rent from them by distress or action, after giving notice of the mortgage and making a demand of the rent. See Powell on Mortgages. 66, 67, 68; and Bacon's Ab. tit. Mortgage, c. note c. Unfortunately these authors do not cite a case that turned on this point, nor have I been able to find one; yet cases must have been very frequent and familiar if such were the law. A mortgagee

would seldom bring an ejectment, which is the common way, if by distraining the tenant he could get into possession of the rent; for he would not only obtain thereby the rent towards his interest, but get into possession also. The only case cited by those authors is that of *Birch v. Wright*, 1 Term. Rep. 378; but that was the case of one who had been a tenant from year to year of the mortgagor from before the date of the mortgage till many years after it. Buller, Justice, said, "I consider him as holding all that time under a demise made before the conveyance to the plaintiff; for if tenant from year to year holds for four or five years, either he or his landlord may declare on the demise as having been made for such a number of years, and so it was expressly laid down by Holt, C. J., in *Legg v. Strudwick*, Salk. 414."

But their position is not more destitute of cases to support it, than it is to my mind of principle. How could Sounders attorn to the mortgage at the time it was made, when he was no tenant at that time nor till three or four years afterward? How can the court consider him as having attorned at that time without an absurdity? Could Sounders' rent have been part and parcel of the estate when Holmes conveyed it, at which time there was no such rent in being? And Holmes had no such rent to convey. It is a maxim, according to Co. Lit. lib. 3, sec. 554, that no man shall attorn to a grant but he who is immediately privy to the grantor; therefore Sounders could not attorn to a grant of Holmes, for he was not his lessee, he held no part of the estate, and there was no relation or privity between them.

As a mortgagor remains in possession only at the will of the mortgagee, and in the meantime receives the rent and pays it over to keep down the interest of the mortgage, he was once accidentally likened to an agent of the mortgagee; from thence an inference was hastily drawn that if the agent at any time made a lease the mortgagee as principal might have the benefit of it. But a mortgagor in possession is no agent; for according to a long train of decisions he cannot be made to account either in law or equity for the profits he may have received from the estate; the idea of an agency was therefore instantly exploded. In fine, no principle presents itself to my mind on which a mortgagee who is neither party nor privy to a lease can claim the benefit of it against the will of the lessor and lessee and in contravention of the covenant therein, that the lessee shall pay the rent to the lessor. The question now under consideration came up in the Supreme Court of the State of New York directly in the case of *McKeeher v. Huntley*, 16 John. 286, and there the court held unanimously that where the lease is subsequent to the date of the mortgage, a mortgagee can neither distrain nor bring an action for rent against the tenant,

there being no privity of contract or estate between him and such tenant, without which there can be no distress nor action for rent.

It was insisted that the mortgagees, having the legal estate and also peaceable possession by Souders their tenant, had a right to keep it; that the attornment of their tenant to Vansickle and Garrison became entirely void under the 12th section of the act (Rev. Laws, 192), and gave them no possession nor right or title to the rent. The validity of Souders' attornment to the mortgagees depends on the question whose tenant he was at the time he attorned. The statute says that the possession of estates is rendered precarious by the practice of tenants in attorning to strangers, whereby the landlords of such tenants are turned out of possession and put to great trouble and expense; therefore, every such attornment (meaning to strangers) shall be void, and the possession of such landlord shall not be deemed or construed to be changed, altered or affected thereby. Now Maxwell and Conover had put Souders in possession as their tenant, and he could not lawfully attorn to any person but their grantee. The sheriff's act in conveying Maxwell's right was the same thing as a conveyance by Maxwell himself, the sheriff being a legal agent of his to transfer the title (1 South. 273). To this transfer of his landlord it was proper that Souders should attorn, as he did, and the court must have considered him as having attorned whether he did or not. Vansickle and Garrison having thus become his landlords he could not turn over their possession to strangers without contravening the statute; and the court must consider his attempt to do so as having no power to change, alter or affect the lawful possession of Vansickle and Garrison, the landlords. The mortgagees had therefore no legal possession.

But it is argued that attornment to a mortgagee after the mortgage becomes forfeited is made good by the proviso of the 17th section. I think it is inaccurate to say that the statute makes any attornment good; its whole office is to make certain attornments, so called, void. In vacating certain attornments it provides that it shall not extend to three cases, namely: that made by consent of the landlords; that to a mortgagee after the mortgage becomes forfeited; and that made by direction of a court of justice; it neither makes these good nor makes them void, but leaves them to be good or not according to the manner in which they have been made. Now attornment is the consent of a tenant to the grant of his landlord; he must be a tenant, and the grant assented to must be that of his landlord; the assent of any stranger is no attornment for want of privity. Lord Coke says it is a maxim that no man can attorn to a grant but he that is privy to the grantor (1 Ins. lib. 3, sec. 554). Now when John Holmes made the grant of the mortgage,

none but his tenant could attorn to it. Souders stood as to him a stranger without the least privity between them. His agreement many years afterward to pay rent to the mortgagees was so far from being an attornment to that grant, that it is a misnomer to give it that appellation, for want of privity in law between him and the grantor.

Finally, it was argued that Vansickle and Garrison had no right in the premises that was not extinguished by the decree of foreclosure, and the tenant should have been permitted to prove that the title of his landlords had expired. But I apprehend that this could not have been lawfully permitted. In the case of *Cook v. Lonley*, 5 Ter. Rep. 4, the court held it to be a common rule that a tenant should not be allowed to impeach his landlord's title in an action for use and occupation. In *Lewis v. Wallace*, Bul. N. Pr. 139, the court said that where a tenant held by permission the landlord should recover though he had no title at all. This principle is most fully recognized in *Knight v. Smith*, 4 Maul. & Selw. 349; see also 4 Cowen, 576, and the cases collected in Woodfall's Landlord and Tenant, 330, too numerous to be cited. There seem to be some exceptions to this rule, where a tenant has been ejected or turned out of possession by title paramount, and where the lease shews that the title will expire at a certain time or on a certain event, as in consequence of the lessor being only an executor during the minority of A.; but this case comes under none of those exceptions. It would form the plain precedent of a tenant occupying by permission till the end of his term, and then evading the payment of rent by denying the landlord's title for the very time that the tenant held under him. On the whole, the matters offered in evidence would not have amounted to a legal defence, and were properly overruled. I am therefore of opinion that the judgment of the court below ought to be affirmed.

Judgment affirmed.¹

NEW YORK REAL PROPERTY LAW, § 194. *Attornment by tenant.* The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either:

¹ "This case was reversed by the Court of Errors, November term, 1832." —Halst. N. J. Dig., *Tenant*, 10. And see *Price v. Smith*, 1 Green Ch. 316 (1838), and *Sanderson v. Price*, 1 Zabn. 637 (1846), recognizing the efficacy of attornment of tenant to mortgagee, under the statute (Gen. Stat. [1896] 1920, § 26).

1. With the consent of the landlord; or,
2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or,
3. To a mortgagee, after the mortgage has become forfeited.¹

MAINE REV. STAT. (1883), chap. 90, § 2. A mortgagee, or person claiming under him, may enter on the premises, or recover possession thereof, before or after breach of condition, when there is no agreement to the contrary; but in such case, if the mortgage is afterwards redeemed, the amount of the clear rents and profits from the time of taking possession shall be accounted for and deducted from the sum due on the mortgage.

MASS. PUB. STAT. (1882), chap. 181, § 10. Nothing contained in this chapter shall prevent a mortgagee or any person claiming under him from entering on the premises or from recovering possession thereof before breach of the condition of the mortgage, when there is no agreement to the contrary.

VERMONT STAT., § 1498. Every mortgagor shall, until condition broken, have, as against the mortgagee, the legal right of possession to the mortgaged premises, unless it is otherwise stipulated in the mortgage deed.

¹ To the same effect are New Jersey Gen. Stat. (1896), p. 1920, § 26, and Missouri Rev. Stat. (1889), § 6373.

"It is claimed that the attornment to defendant is valid under section 2013 of the Code, which is as follows: 'The attornment of a tenant to a stranger is void, unless made with the consent of the landlord, or pursuant to or in consequence of a judgment at law or in equity, or to a mortgagee after the mortgage has been forfeited.' It is claimed that the mortgage to Hamilton was forfeited by the non-payment, at maturity, of the note secured, and that thereupon the tenant in possession had the right to attorn and transfer the constructive possession to defendant. This cannot be the meaning of this section. Under such a construction all the decisions of this court holding that the legal title and right to possession are in the mortgagor until after foreclosure and expiration of the year for redemption, could be evaded and nullified in all cases where the mortgaged property is in possession of a tenant. The decisions relied upon by appellant were based upon the common law idea of a mortgage, under which, in default of payment at the time named, the mortgagee was entitled to possession of the mortgaged premises, and might maintain an action of ejectment therefor. We are satisfied that under this section there can be no valid attornment until after foreclosure and expiration of the period of redemption, where the property is sold subject to redemption."—*Per Day, J.*, in *Mills v. Hamilton*, 49 Ia. 108 (1878). See also *Mills v. Heaton*, 52 Ia. 215 (1879), and Code (1897), § 2990, in which the ambiguity is removed. The similar provision of the Wisconsin statute (R. S. [1871] 1165, § 1), apparently interpreted in accordance with *Jones v. Clark*, has also been repealed. Ann. Stat. (1889), § 2182.

N. Y. CODE CIV. PROC. *Action to recover real property*, § 1428. A mortgagee, or his assignee or other representative, cannot maintain such an action, to recover the mortgaged premises.

STONE v. PATTERSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1837.

(19 *Pick.* 476.)

Assumpsit for rent from April 1st, 1835, to January 1st, 1836. On a case stated it appeared, that one Knight, being the owner of the premises, subject to a mortgage to one French, executed a lease of the same to the defendant, on the 1st of April, 1835, for three years, at a certain rent per annum, payable quarterly; that the defendant paid Knight a part of the rent in advance; that in May, 1835, Knight conveyed the premises to the plaintiffs in fee, subject to the mortgage and lease, without notice of such payment of the rent in advance, and that the plaintiffs notified the defendant that he must pay the rent to them as it should become due; that on the 20th of July, 1835, the mortgagee took possession of the premises for condition broken, but without notice to the plaintiffs, and ordered the defendant to pay the rent to him, and the defendant thereupon agreed to pay it to him from that time; and that the sum paid in advance exceeded the rent accruing between the date of the lease and the time of the entry by the mortgagee.

W. Smith, for the plaintiffs, cited to the point that the entry by the mortgagee was ineffectual, *Thayer v. Smith*, 17 Mass. R. 429; *Stearns on Real Actions*, 35; *Gibson v. Crehore*, 5 *Pick.* 151.

G. Parker, for the defendant, cited as to the rent paid in advance, St. 4 & 5 Anne, c. 16; *Sturdy v. Arnaud*, 3 T. R. 599; *Farley v. Thompson*, 15 Mass. R. 18; and as to the entry by the mortgagee, *Fitchburg Manuf. Corp. v. Melven*, 15 Mass. R. 268; *Read v. Davis*, 4 *Pick.* 216; *Smith v. Shepard*, 15 *Pick.* 147.

PER CURIAM. The payment of rent in advance was a valid payment and a good discharge *pro tanto* from the claim of the lessor to whom payment was made, and is a good bar to the claim of the plaintiffs, his assignees. The case of *Farley v. Thompson*, 15 Mass. R. 18, is decisive on this part of the case. It has been argued that the assignees ought to have been notified; and no doubt this would have been necessary if the rule of law in respect to negotiable

securities applied to the assignments of leases; but these assignments are governed by the well-known rule of *caveat emptor*.¹

In respect to the other portion of the rent claimed, it is quite clear that the defendant was bound to pay it to French, who entered under a mortgage made previously to the lease, and ordered the rent to be paid to him. It is objected that this entry was not a good entry for condition broken, because no notice was given to the plaintiffs. But it is immaterial whether it was a good entry for the purpose of foreclosure or not; for the entry was lawful, and the mortgagee thereby became possessed of the premises, and might have expelled the defendant if he had not agreed to pay rent to him. This was equivalent to an actual and complete ouster or eviction, as was decided in *Fitchburg Manuf. Corp. v. Melven*, 15 Mass. R. 268, and in *Smith v. Shepard*, 15 Pick. 147. Such an ouster or eviction by a person having a paramount title is a good defence to an action for rent by the lessor or those claiming under him.

*Plaintiffs nonsuit.*²

KIMBALL v. LOCKWOOD.

SUPREME COURT OF RHODE ISLAND, 1859.

(6 R. I. 138.)

Debt for rent of a shop in High Street, Providence, wherein the plaintiff claimed \$150, for the last three quarters of the year elapsing between March 1, 1858, and March 1, 1859, under a lease parol by him made to the defendants.

The case was submitted to the court, under the general issue, in fact and law; and it appeared that the late Henry Matthewson, being the owner of the leased premises, in his lifetime mortgaged them in fee to his son, Henry C. Matthewson, and upon his death they, with other real estate, came into the possession of the plaintiff.

¹ See *Farley v. Thompson*, 15 Mass. 18 (1818), *accord. De Nicholls v. Saunders*, 5 C. P. 589 (1870), *Cook v. Guerra*, 7 C. P. 132 (1872), and (*semble*) *Castleman v. Belt*, 2 B. Mon. (Ky.) 157 (1841), *contra*.

² *Rockwell v. Bradley*, 2 Conn. 1 (1816); *Wakeman v. Banks*, 2 *id.* 446 (1818); *Blancy v. Barse*, 2 Greenl. (Me.) 132 (1822); *Den v. Stockton*, 7 Halst. (N. J.) 322 (1831); *Carroll v. Ballance*, 26 Ill. 9 (1861); *Gray v. Gillespie*, 59 N. H. 469 (1879); *Comer v. Shechan*, 74 Ala. 452 (1883), *accord.* So, after condition broken: Vermont Stat., § 1498 (page 330, *supra*); *Pierce v. Brown*, 24 Vt. 165 (1852); *Gartside v. Outley*, 58 Ill. 210 (1871) (*semble*); or for the purpose of enforcing payment: *New Haven Savings Bank v. McPartland*, 40 Conn. 90 (1873); or after foreclosure: *Downard v. Graff*, 40 Ia. 597 (1875).

whose wife was one of said Matthewson's heirs at law; that, being thus in possession, the plaintiff leased the shop in question to the defendants by parol, from March 1, 1858, to March 1, 1859, at the rent of \$200 for the year, payable quarterly; that after the death of his father, the son's mortgage having become due, on the 13th day of May, 1858, he sued the plaintiff in ejectment to recover possession of the estate of which the shop in question was a tenement, and gave notice to the defendants to pay their rent to him as mortgagee; that the defendants, having offered under the advice of counsel to pay rent to the plaintiff if he would give them a bond of indemnity against the claim of the mortgagee, which he did not do, promised the mortgagee to pay the rent to him, and did pay to him the last three quarters rent, accruing from the first day of June, 1858, to the first day of March, 1859, under a bond of indemnity from the mortgagee against the claim of the plaintiff, to recover which rent, after such payment, this action was brought. The rent of the quarter during which notice was given by the mortgagee to the defendants to pay the rent to him, was paid by them to the plaintiff.

James Tillinghast, for the plaintiff, cited *Evans v. Elliot*, 9 Ad. & Ell. 392; *Field v. Swan*, 10 Met. 112.

B. N. Lapham, with whom was *Wm. H. Potter*, cited *Morse v. Gallimore, et al.*, Doug. 279; *Keech v. Hall*, *ib.* 21; *Birch v. Wright*, 1 T. R. 378; *Pope v. Briggs*, 9 B. & C. 245; *Babcock v. Kennedy*, 1 Vt. 457; *Stone v. Patterson*, 19 Pick. 476; *Jones v. Clark*, 20 Johns. 51.

AMES, C. J. It seems to be clear, upon principle, and is well settled by authority, that a mortgage by the lessor of lands under lease, operating as an assignment *pro tanto* of the reversion, carries the rent as incident to it to the mortgagee. In such case, therefore, all that the law requires of the mortgagee to entitle him to rent of the tenant of the mortgagor, is notice to the tenant to pay the rent to him; such notice preventing any injustice to the tenant from double payment.

If, on the other hand, the lease be subsequent to the mortgage, as the mortgage gives to the mortgagee no title to the reversion out of which the lease was granted, he cannot by mere notice compel the tenant to pay rent to him, nor does his title to the rent accrue until he has obtained possession of the mortgaged estate. He is not the landlord of the mortgagor, nor by virtue of the relation between them entitled to the rents and profits of the mortgaged estate as long as the mortgagor retains possession (*Evans v. Elliot*, 9 Ad. & Ell. 159; *The Manchester Hospital and Life Ins. Co. v. Wilson*, 10 Met. 126).

The mortgage, however, conveys the title to possession to the

mortgagee, and, indeed, when, as in this case, forfeited, the whole title at law; and, unless some statute forbid, which none here does, the tenant of the mortgagor may attorn to the mortgagee, and by thus placing him in possession of the mortgaged premises entitle him to the rents thereof. There is no disloyalty to his landlord in such attornment by the tenant, since thereby he only recognizes a title which his landlord has granted (*Jones v. Clark*, 20 Johns. 51). In *Evans v. Elliot*, *supra*, Lord Denman seems to agree that the tenant's attornment will create a privity between himself and the mortgagee, or, as he expresses it, "is at least necessary" to create the relation of tenant and landlord between them; although he decides that the attornment will not relate back to a notice before given by the mortgagee to the tenant, but creates the privity and right to rent only from the time when it is actually made. As attornment is nothing more than the consent of the tenant to the grant of the seignory, or, in other words, to become tenant of the new lord (Co. Lit. 309 *a*; Butler's note, 272), and the tenants in this case, by promising to pay and actually paying the rent to the mortgagee, thus attorned to, and became tenants to him, it follows that they rightfully paid to him the subsequently accruing rent, and cannot be compelled to pay it over again to the plaintiff. Judgment must therefore be rendered for the defendants, for their costs.¹

HUBBELL v. MOULSON.

COURT OF APPEALS OF NEW YORK, 1873.

(53 N. Y. 225.)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendants, entered upon an order denying motion for a new trial and directing a judgment on verdict.

This action was ejectment to recover possession of the undivided half of a lot of land situate in Brighton, Monroe County. The facts appear sufficiently in the opinion. The court directed a verdict in favor of defendants, which was rendered accordingly.

¹ *Stedman v. Gassett*, 18 Vt. 346 (1846), *accord*. That neither entry by the mortgagee nor attornment of the tenant is necessary to entitle the mortgagee to "intercept" the rents, see *Marx v. Marx*, 51 Ala. 222 (1874); *Comer v. Sheehan*, 74 Ala. 452 (1883). But compare *Drakford v. Turk*, 75 Ala. 339 (1883), and see *Bartlett v. Hitchcock*, 10 Bradw. (Ill.) 87 (1881), *contra*.

Exceptions were ordered heard in the first instance at General Term.

Francis Kernan for the appellant. Payment of the mortgage or tender of the amount due discharges the lien of a mortgagee (3 R. S., 3d ed., 599, 850; 4 Kent's Com., 11th ed., 169, note 4; *Edwards v. Farmers' Ins. Co.*, 21 Wend. 467; s. c. in error, 26 *id.* 541; *Arnott v. Post*, 6 Hill, 65; *Kortright v. Cady*, 21 N. Y. 343; *Waring v. Smith*, 2 Barb. Ch. 119, 135). After payment or tender of the amount due an action of ejectment will lie (21 Wend. 467; 26 *id.* 541; 6 Hill, 65).

W. F. Cogswell for the respondents. Defendants were mortgagees in possession, and an action of ejectment could not be maintained against them (*Van Duyne v. Thayer*, 14 Wend. 233; *Phyfe v. Riley*, 15 *id.* 248; *Chase v. Peck*, 21 N. Y. 581; *Hubbell et al. v. Sibley*, MS).

ANDREWS, J. The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of \$7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of the action. The defendants are the grantees of Sibley, the mortgagee, under a deed dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the right of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him (*Jackson v. Mueller*, 10 J. R. 479; *Jackson v. Bowen*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320). The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, of rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when the action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession (*Van Duyne v. Thayer*, 14 Wend. 233; *Phyfe v. Riley*, 15 Wend. 248; *Pelt v. Utour*, 18 N. Y. 139). Leaving out of view the alleged title under the statute foreclosure, the question arises, whether the receipt by a mortgagee in possession of rents and profits sufficient to satisfy the mortgage debt, does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted, it would not have shown a right in the

plaintiffs to the possession of the premises when the action was brought.

It is the settled doctrine in this State that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged (*Runyan v. Mersereau*, 11 J. R. 537; *Jackson v. Craft*, 18 *id.* 110; *Jackson v. Bronson*, 19 *id.* 325; *Kortright v. Cady*, 21 N. Y. 343; *Stoddard v. Hart*, 23 *id.* 560). In harmony with this view it was held in *Kortright v. Cady* that a tender of the mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in *Edwards v. The Fireman's Fire Ins. and Loan Co.*, 21 Wend. 467, 26 *id.* 541, that upon a tender after default by a mortgagor of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is, in some cases, treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this is found in *Mickles v. Townsend*, 18 N. Y. 575, where it was so held for the purpose of applying the doctrine of estoppel by deed against a person claiming as assignee of a mortgage which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterward. And in *Van Dyne v. Thayer*, 19 Wend. 162, the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee so as to prevent the plaintiff's recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land (*Cowen, J.*, 21 Wend. 485).

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely and exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption (2 Wash. on Real Property, 161, 205; *Seaver v. Durant*, 39 Vt. 103; *Parson v. Welles*, 17 Mass. 419). But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor (2 Pow. on Mort., 946 *a*; 2 Wash. 205). They are applied in equity as an equitable set-off to the amount due on

the mortgage debt (*Ruckman v. Astor*, 9 Paige, 517). The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default (2 Powell on Mort., 957, note; 4 Kent, 185; 2 Wash. 218; *Cameron v. Irvine*, 5 Hill, 272; *Mickles v. Dillaye*, 17 N. Y. 80). In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of an agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage. These considerations lead to an affirmance of the judgment without considering the question of the validity of the statute foreclosure.

The plaintiffs claim to recover upon the allegation of a right to the possession of the premises when the action was commenced. The defendants were in possession, claiming under the mortgagee whose mortgage was outstanding and unsatisfied. The action is not for a redemption or for an accounting, and the plaintiffs are not in the attitude of resisting an attempt by the mortgagee to enforce the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

¹ *Phyfe v. Riley*, 15 Wend. 248 (1836); *Madison Ave. Church v. Oliver St. Church*, 73 N. Y. 82 (1878); *Townshend v. Thomson*, 139 N. Y. 132 (1893); *Gillett v. Eaton*, 6 Wis. 30 (1857); *Hennesy v. Farrell*, 20 Wis. 42 (1865); *Harper v. Ely*, 70 Ill. 581 (1873); *Johnson v. Sandberg*, 30 Minn. 197 (1883), *accord*. But where the mortgagee claims under an equitable mortgage, see *Jackson v. Parkhurst*, 4 Wend. 369 (1830) and *Chase v. Peck*, 21 N. Y. 581, 586, *supra*, p. 128.

KING v. HOUSATONIC RAILROAD COMPANY.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1877.

(45 Conn. 226.)

Scire facias upon a process of foreign attachment, brought to the Superior Court in Fairfield County, and tried to the court on the general issue with notice, before Beardsley, J.

A. S. Treat, with whom was R. Averill, for the plaintiff in error.

H. B. Harrison and W. K. Seeley for defendants in error.

HOVEY, J. The proceedings below were upon a *scire facias* to recover certain rents due from the defendants as lessees of the New York, Housatonic & Northern Railroad Company. The lease reserving the rents was executed on the 26th day of February, 1872, and was for the term of five years from the 1st day of March then next, when the defendants entered into possession under the lease. Subsequently, on or about the first day of October, 1872, the lessors, being the owners of the leased premises, mortgaged the same, with other property situate in the State of New York, to secure the payment of certain bonds of the mortgagors, amounting to the sum of two million dollars, to David S. Dunscomb and Erastus F. Mead, as trustees for those who might become holders of the bonds. The principal of the bonds was made payable on the first day of October, 1892, and the interest semi-annually on the first day of April and the first day of October in each year, upon the presentation and surrender of the interest warrants or coupons which were annexed to the bonds. And the mortgage expressly authorized the mortgagees, after six months' default in the payment of interest, to enter into and take possession of the property mortgaged and receive the rents, income and profits thereof. Soon after the execution of the mortgage the bonds passed into the hands of *bona fide* holders for value, and still remain outstanding and unpaid. The mortgagors having made default in the payment of interest more than six months prior to the 15th day of March, 1875, and interest to a large amount being then due and unpaid, the mortgagees on that day gave notice thereof to the defendants and demanded of them the rents then due and thereafter to become due under their lease. Five days afterwards the plaintiff commenced a suit by foreign attachment against the mortgagors, the New York, Housatonic and Northern Railroad Company, and attached the rents then due, amounting to the sum of \$2,215.60. In that suit the plaintiff recovered judgment, took out execution, placed the execution in the hands of a proper officer, and the officer, by virtue of the execution,

on the 23d day of December, 1875, made demand of the present defendants of the sums contained in the execution and of any estate of the New York, Housatonic and Northern Railroad Company in their hands, but the defendants refused to comply with the demand. And on the 21st day of February, 1876, the suit upon which the proceedings below were had was brought. The court below rendered judgment in favor of the defendants; and the question is whether in so doing the court erred.

It is a well-settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion (Co. Litt. 151, 152; 2 Bl. Comm. 176; 4 Kent, 354). The consent of the tenant, expressed by what was called his attornment, was, however, necessary to the perfection of the grant in England, until the fourth year of the reign of Queen Anne; but in that year a statute was passed which made the grant effectual without attornment. And since that time notice of the grant to the tenant has been sufficient to entitle the grantee to demand and recover the rents (*Birch v. Wright*, 1 T. R. 384; *Lumley v. Hodyson*, 16 East, 99).

Where the grant is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he elects not to take them, as he generally does so long as his interest is paid, he may forbear to give notice to the tenant, and in that case the mortgagor is authorized to collect the rents and appropriate them to his own use. But if the mortgagee elects to take the rents and gives notice of his election to the tenant, he then becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. The leading authority for this doctrine is the case of *Moss v. Gallimore*, Doug. 279. The decision in that case seems to have settled the law in England (2 Cruise Dig. 84; *Birch v. Wright*, *supra*; *Trent v. Hunt*, 9 Exch. 14). And its soundness, in view of the relations of a mortgagor and mortgagee of a reversion to each other and to a tenant in possession under a lease prior to the mortgage, cannot well be questioned. In commenting upon the decision, the learned English editor of Smith's Leading Cases observes that it "is upon a point which seems so clear in principle that, were it not for its general importance, it would, perhaps, be matter of surprise that any case should have been deemed requisite to establish it" (1 Smith's Lead. Cas. 693). It is true, as suggested by counsel for the plaintiff, that the court, in making that decision, was governed by the provisions of the

statute of Anne. But the principle embodied in that statute, and enforced in the case of *Moss v. Gallimore*, has been adopted by the courts of last resort in many of our sister States (4 Kent, 165), and was expressly sanctioned and approved by this court in the case of *Baldwin v. Walker*, 21 Conn. 168. In that case one Stoddard, being the owner of an undivided half of certain real estate, leased it to the defendant for a term of years and afterwards mortgaged it to the plaintiff. The defendant had notice of the mortgage, but refused to pay to the plaintiff the rent due under the lease, and the plaintiff sued in an action of covenant to recover it, and judgment was rendered in his favor. The case then came to this court upon a motion for a new trial, and also upon a motion in error. Both motions were unsuccessful, and the judgment below was affirmed. Church, C. J., in giving the opinion of the court, after referring to the lease, and declaring that as between Stoddard, the lessor, and the defendant the lease must be treated as an effective one and as leaving, when made, a reversion in Stoddard, says: "By his mortgage to the plaintiff this reversion, as a subsisting legal interest, was conveyed or assigned to the plaintiff, unless he elected to treat it as void. This he has not done, but claims, as he may, his right as mortgagee or assignee to the rent incident to such reversion;" citing 2 Cruise's Dig. 111; *Moss v. Gallimore*, Doug. 279; 2 Swift Dig. 179; *Fitchburg Manuf'g Co. v. Melvin*, 15 Mass. 268. The learned judge then observes that, "if the lease had been executed after the mortgage to the plaintiff, he could not as mortgagee, perhaps, have any remedy for the recovery of this rent, without attornment, for want of legal priority." That case is decisive of the one at bar and fully sustains the court below in the judgment which it rendered in favor of the defendants. The judgment must, therefore, be affirmed.

In this opinion the other judges concurred.¹

TEAL v. WALKER, 111 U. S. 242 (1884). MR. JUSTICE WOODS (247). The decision of the question raised by the demurrer to the complaint is not affected by the stipulation contained in the defeasance of August 19th, 1874, that Goldsmith and Teal should, on default made in the payment of the principal of Goldsmith's note, and on the demand of Hewett, surrender the mortgaged premises to

¹ *Baldwin v. Walker*, 21 Conn. 168 (1851); *Abbott v. Hanson*, 24 N. J. Law, 493 (1854); *Russell v. Allen*, 2 Allen (Mass.) 42 (1861), and *Mirick v. Hoppin*, 118 Mass. 582 (1875), accord. So, after forfeiture, *McKircher v. Hawley*, 16 Johns. (N. Y.) 289 (1819), *semble*. But compare *Myers v. White*, 1 Rawle (Penn.) 355 (1829) (*semble*), *contra*.

him. If this was a valid and binding undertaking, it did not change the rights of the parties. Without any such stipulation, Hewett, unless it was otherwise provided by statute, was entitled, at least on default in the payment of the note of Goldsmith, to the possession of the mortgaged premises (*Keech v. Hall*, 1 Doug. 21; *Rockwell v. Bradley*, 2 Conn. 1; *Smith v. Johns*, 3 Gray, 517; *Jackson v. Dubois*, 4 Johns. 216; *Furbush v. Goodwin*, 29 N. H. 321; *Howard v. Houghton*, 64 Me. 445; *Den ex dem. Hart v. Stockton*, 7 Halst. 322; *Ely v. McGuire*, 2 Ohio, 223; vol. 1 and 2, 2d Ed. 372). The rights of the parties are, therefore, the same as if the defeasance contained no contract for the delivery of the possession.

We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. In the case of *Moss v. Gallimore*, 1 Doug. 279, Lord Mansfield held that a mortgagee, after giving notice of his mortgage to a tenant in possession holding under a lease older than the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards. This ruling has been justified on the ground that the mortgagor, having conveyed his estate to the mortgagee, the tenants of the former became the tenants of the latter, which enabled him, by giving notice to them of his mortgage, to place himself to every intent in the same situation towards them as the mortgagor previously occupied (*Rawson v. Eicke*, 7 Ad. & El. 451; *Burrowes v. Gradin*, 1 Dowl. & Lowndes, 213). Where, however, the lease is subsequent to the mortgage, the rule is well settled in this country, that, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he cannot proceed, either by distress or action, for the recovery of the rent (*Mayo v. Shattuck*, 14 Pick. 533; *Watts v. Coffin*, 11 Johns. 495; *McKircher v. Hawley*, 16 *id.* 289; *Sanderson v. Price*, 1 Zab. 637; *Price v. Smith*, 1 Green's Ch. [N. J.] 516).

The case of *Moss v. Gallimore* has never been held to apply to a mortgagor or the vendee of his equity of redemption. Lord Mansfield himself, in the case of *Chinnery v. Blackman*, 3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made. The rule on this subject is thus stated in Bacon's Abridgement, title Mortgage, C: "Although the mortgagee may assume possession by ejectment at his pleasure, and, according to the case of *Moss v. Gallimore*, Doug. 279, may give notice to the tenants to pay him the rent due at the time of the notice, yet, if he suffers the mortgagor to remain in possession or in receipt of the rents, it is a

privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient." So, in *Higgins v. York Buildings Company*, 2 Atk. 107, it was said by Lord Hardwicke: "In case of a mortgagee, where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor," and the same judge said in the case of *Mead v. Lord Orrery*, 3 Atk. 244: "As to the mortgagor, I do not know of any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession." In *Wilson, ex parte*, 2 Ves. & B. 252, Lord Eldon said: "Admitting the decision in *Moss v. Gallimore* to be sound law, I have been often surprised by the statement that a mortgagor was receiving the rents for the mortgagee. . . . In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the court will, in some cases, give an account of the past rents. There is not an instance that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rents for the mortgagee." See, also, *Coleman v. Duke of St. Albans*, 3 Ves. Jr. 25; *Gresley v. Adderly*, 1 Swanst. 573.

The American cases sustain the rule that, so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession (*Wilder v. Houghton*, 1 Pick. 87; *Boston Bank v. Reed*, 8 Pick. 459; *Noyes v. Rich*, 52 Me. 115). In *Hughes v. Edwards*, 9 Wheat. 500, it was held that a mortgagor was not accountable to the mortgagee for the rents and profits received by him during his possession, even after default, and even though the land, when sold, should be insufficient to pay the debt, and that the purchaser of the equity of redemption was not accountable for any part of the debt beyond the amount for which the land was sold. In the case of *Gilman v. Illinois & Mississippi Telegraph Company*, 91 U. S. 603, it was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchises, "together with the tolls, rents, and profits to be had, gained, or levied thereupon," to secure the payment of bonds issued by it, the trustees, in behalf of the creditors, were not entitled to the tolls and profits of the road, even after condition broken

and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed. The court said, in delivering judgment in this case: "A mortgagor of real estate is not liable for rent while in possession. He contracts to pay interest, not rent." So in *Kountze v. Omaha Hotel Company*, 107 U. S. 378, it was said by the court, speaking of the rights of a mortgagee: "But in the case of a mortgage, the land is in the nature of a pledge; it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. . . . The plaintiff in this case was not entitled to possession, nor to the rents and profits." See also *Hutchins v. King*, 1 Wall. 53, 57-58.

Chancellor Kent states the modern doctrine in the following language: "The mortgagor has a right to lease, sell and in every respect to deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him, takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover the possession by regular entry by suit before he can treat the mortgagor, or the person holding under him, as a trespasser" (4 Kent Com. 151). See also *American Bridge Company v. Heidelberg*, 94 U. S. 798; *Clarke v. Curtis*, 1 Grattan. 289; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. 38; *Hunter v. Hays*, 7 Biss. 362; *Soutter v. La Crosse Railway*, Woolworth C. C. 80, 85; *Foster v. Rhodes*, 10 Bank Reg. 523. The authorities cited show that, as the defendant in error took no effectual steps to gain possession of the mortgaged premises, he is not entitled to the rents and profits while they were occupied by the owner of the equity of redemption.

The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 323, chapter 4, title 4, General Laws of Oregon, 1843-1872, which declares that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law." This provision of the statute cuts up by the roots the doctrine of *Moss v. Gallimore*, *ubi supra*, and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance, and the mortgagee is not entitled to possession, his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as

the effect of a mortgage in that State. In *Besser v. Hawthorn*, 3 Oregon, 129, at 133, it was declared: "Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title." See, also, *Anderson v. Baxter*, 4 Oregon, 105; *Roberts v. Sutherlin*, *id.* 219.

The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19th, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and, although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the State, it cannot be enforced (*Railroad Company v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Company*, 93 U. S. 174; *Marshall v. Baltimore & Ohio Railroad Company*, 16 How. 314; *Mequire v. Corvine*, 101 U. S. 108).

CHAPTER I. (*Continued.*)

SECTION III. DOWER AND CURTESY.

NASH v. PRESTON.

COURT OF KING'S BENCH, 1631.

(3 *Cro. Car.* 190.)

A bill in chancery was referred to Jones, Justice, and myself [Croke, J.] to consider whether one should be relieved against dower demanded, &c.

The case appeared to be that J. S., being seised in fee, by indenture inrolled, bargains and sells to the husband for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition that if he paid the hundred and twenty pounds at the end of twenty years the bargain and sale shall be void. He re-demised it accordingly, and dies; his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised

immediately to them as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case we conceived that by the law she is to have dower; for by the bargain and sale the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is against the rule of law, viz., "Where no fraud or covin is, a court of equity will not relieve." And upon conference with the other justices at Serjeants-Inn upon this question, who were of the same judgment, we certified our opinion to the court of chancery that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

NOEL v. JEVON, 2 Freem. Ch. 43 (1678). *In Curia Cancellariæ*. The bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash v. Preston*, 1 Cro. Car. 191, and so it was said is the constant practice of the court now.¹

¹ "If the husband was seised merely as trustee, the wife would be entitled to dower at common law; but this court would not suffer her to take advantage of it."—*Hinton v. Hinton*, 2 Ves. Sen. 634. "Because the estate, in equity, would not belong to the trustee but to the *cestui que trust*."—*Finch v. Earl of Winchelsea*, 1 P. Wms. 278.—Rep.

CASHBORN v. INGLISH.

COURT OF CHANCERY, 1738.

(7 *Vin. Abr.* 156.)

The resolution of the court by LORD CHANCELLOR [HARDWICKE]. The principal question in this case, on which I am now to give my opinion, is whether the defendant English can be tenant by the curtesy of an equity of redemption. The mortgagee came into possession in 1731.

Thomas Cashborn, father of the plaintiff and of the wife of the defendant English, by virtue of a marriage settlement being seized of some lands in tail and of other lands in fee simple, had issue three daughters. Part of the land of which he was seized in fee he settled on himself for life, with remainder to Anne, his eldest daughter in fee, and the other part of such lands he devised by his will to the said Anne, his daughter, and her heirs, subject to the payment unto her two sisters of £200 apiece. Anne, after the death of her father, borrowed £900 of the defendant Scarf, and by lease and release of 24th and 25th of June, 1728, mortgages part of the fee simple lands to the said Scarf and his heirs, under a proviso to be void on payment of £900 and interest. August 6th, 1729, the said Anne intermarried with the defendant English, and in 1731 died, leaving issue by him a son, who died without issue, and on his death his two aunts, the plaintiffs, became his heirs at law and entitled to that inheritance, and, as such, brought their bill, Trin., 1733, in this court, against mortgagee defendant Scarf and the defendant English, among other things for a redemption of the mortgaged premises, and to have an account of the rents and profits of the real estate which belonged to the plaintiff's wife, that descended to his son, from the time of the death of such son, as heir at law to both of them.

The defendant English insisted to be entitled to the mortgaged premises for his life, as tenant by the curtesy, and the cause, being at issue, was heard on the 8th of May, 1735, before his Honour, the Master of the Rolls, when it was decreed that the defendant English was not entitled to be tenant by the curtesy of the mortgaged estates, and so was decreed to account for the rents and profits thereof from the death of his son.

From this decree the defendant English thought fit to appeal, and the general question now is whether the husband can be tenant by the curtesy of the equity of redemption upon a mortgage in fee? This question depends on two considerations:

First. What kind of interest an equity of redemption is considered to be in the eye of this court?

Second. What is requisite to entitle the husband to be tenant by the curtesy?

First. What kind of interest in the eye of this court an equity of redemption is? An equity of redemption has always been considered in this court as an estate in the lands; it is such an interest in the land as will descend from ancestor to heir, and may be granted, entailed, devised or mortgaged, and that equitable interest may be barred by a common recovery; which proves that an equity of redemption is not considered barely as a mere right, but such an estate whereof, in the consideration of this court, there may be a seisin, or a devise of it could not be good. The person who is entitled to the equity of redemption is in this court considered as owner of the land, and the mortgagee to retain the land as a pledge or deposit. And for this reason it is that a mortgage in fee is considered as a personal estate, notwithstanding the legal estate vests in the heir in point of law. The husband of a mortgagee in fee shall never be tenant by the curtesy of the mortgaged estate unless there be a foreclosure, or that such mortgage has subsisted for so great a length of time as the court thinks sufficient to induce them not to grant a redemption. . . .

It is objected by the plaintiffs that an equity of redemption is only a right of action, and not to be considered as such an estate whereof there can be a tenancy by the curtesy, but this is by no means well founded; for this is no otherwise a right of action than every trust, and as there can be no benefit had of an equity of redemption but by suing a subpoena out of the court, so is the case of every mere trust in land, which is considered as a real estate in this court, but cannot be come at without a subpoena. To say that is a mere right of action is by consequence to say that the estate in the lands is in nobody, and this determines the question; for if a mortgage is but a chose in action, this affirms that the equity of redemption is the real ownership of the estate, and this will determine the point between them.

It is objected that the mortgagee is not barely a trustee for the mortgagor; it is true, not barely a trustee, but it is sufficient for the present purpose if he is in part a trustee for the mortgagor, and it is most certain that as to the real estate in the land the mortgagee is only a trustee for the mortgagor till foreclosure. Mortgagee is only owner as a charge or incumbrance, and intitled to hold as a pledge, and as to the inheritance descended and real estate in the land, the mortgagee is a trustee for the mortgagor till the equity of redemption is foreclosed.

Secondly. The next consideration is what is requisite to intitle

the husband to be tenant by the curtesy. At law four things are necessary to make a tenancy by the curtesy, to wit, marriage, having issue that may inherit, death of the wife, and seisin of the wife (Co. Litt., 30 a). Here it is admitted that the three first did concur, but the objection that is relied on is that there was no actual seisin of the wife during the coverture, which is contended to be as necessary in respect to an equitable estate as of a legal estate, and it is admitted that the wife had no actual seisin of the legal estate, either in fact or in law. Here is no dispute whether actual seisin in consideration of law, but all that is beside the present question; for the proceedings are upon a supposition, as no such thing as a tenant by the curtesy; but the true question is upon this point, whether there was not such a seisin or possession in the wife of the equitable estate in the land, as in consideration of equity is equivalent to an actual seisin of a legal estate at common law.

In consideration of this court, I am of opinion there was such a seisin of the wife in the present case of the equity of redemption.

I have shown that a person intitled to the equity of redemption is owner of the land of the legal estate; and, if so, there must be a seisin of the legal estate; and what other seisin could there be than what English and his wife had in the present case? For here is a mortgage in 1728 by Anne Cashborn, who in 1729 married with the defendant English, and in 1731 died, leaving issue a son, and the wife was all along in possession till her death, and mortgagee did not come into possession till after her death, and there is not any foreclosure, and though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it, and from thence I think it clearly follows that there cannot be a higher seisin of an equitable estate.

Next, whether there can be tenant by the curtesy? I am of opinion there may be a tenant by the curtesy of the equitable estate of the wife; equity follows the law because made a rule of property.

Williams and Wray, 2 Vern. 680, *Ball's Case* cited: where it was determined that the husband be tenant by the curtesy of a trust estate of the wife, and so clearly there admitted; and yet the case was of a trust for the payment of debts.

Sweetapple and Bindon, 2 Vern. 536: Mrs. Bindon gave money to be laid out in land to be settled on her daughter and her issue, and afterwards the mother dies, and the daughter marries with Sweetapple, by whom she had issue, and dies before the money was laid out in lands; and upon the death of the wife Sweetapple brought his bill, praying that the money might be laid out in lands, and that he might be decreed to hold the same for his life as tenant

by curtesy, which my Lord Cowper decreed accordingly; which is a much stronger case than the present; for in that case there was neither seisin nor lands, but it was determined according to the common received rule of this court in considering money directed to be laid out in land, the same as land. . . .

And as to the next objection of the wife's not being endowed of an equity of redemption on a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proves too much; for it has been determined that a wife shall not be endowed of a trust estate, yet that husband shall be tenant by the curtesy of a trust estate. The argument from dower to the case of a tenant by the curtesy fails in this case. Perhaps it may be hard to find out a sufficient reason how it came to be so determined in the one case and not in the other, but it is safe to follow former precedents and what are settled and established, and if such precedents should be departed from, I hold it fit rather that the wife should be allowed her dower of a trust estate, and not that a tenancy by curtesy of a trust estate should be taken away. It may be refusing to allow the wife dower of a trust estate was because she could not have it at law, and that it was founded on the maxim of *equitas sequitur legem*; but whatever the reason of such refusal was, the husband is allowed to have a tenancy by the curtesy of a trust estate, nay, even of money directed to be laid out in land, though not actually laid out, as in the case of *Swetapple* before cited. . . .

For these reasons, upon the best consideration (although I form my judgment with great deference, when I differ in opinion from other great persons that have gone before me), I am of opinion that the defendant English is intitled to be tenant by the curtesy of the mortgaged premises in question, and the consequence of that is that that part of the decree of his Honour, the Master of the Rolls, whereby it is adjudged that the said defendant is not tenant by the curtesy, must be reversed (MS. Rep. Hill. Vac. 11, Geo. 2).

TITUS v. NIELSON, 5 Johns. Ch. 452 (1821). The petition of Catherine Nielson was presented, claiming dower out of the proceeds of the sale of an equity of redemption in certain mortgaged premises. The opinion was, in part, as follows:

THE CHANCELLOR [KENT]. The claim of the widow must be admitted, according to a series of decisions in the courts of this State. In England dower is considered as a mere legal right and equity follows the law and will not create the right where it does not subsist at law. It is on this principle, according to Lord

Redesdale (2 Sch. and Lef. 388), that a court of equity will not allow dower of an equity of redemption reserved upon a mortgage in fee, though there may be dower of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. The justice, however, of allowing dower of an equitable estate seems to have been very generally felt and acknowledged in the English courts of equity. But we have nothing to do at present with the English adjudications on the subject, for, as our courts of law do now allow dower in certain cases of an equity of redemption, this court, according to the doctrine referred to, ought to follow the law, and also allow dower out of the proceeds of the equity of redemption, and which proceeds have in this case been placed before the court. . . .

The case of *Coles v. Coles*, 15 Johns. Rep. 319, went a step still further, and held that, where a person seised of land in fee mortgages it, and afterwards marries, his widow was entitled to dower out of that equity of redemption, against the purchaser of that equity, though the mortgage was still subsisting. Here was a final and full establishment in our courts of law of the principle, not admitted in the English courts of law, that a wife could be endowed of an equity of redemption arising upon a mortgage in fee, and this court ought to follow the rule of law. It ought to do so, according to the rule and practice of the courts of equity in England in the like case, and because the doctrine recognizing the legal title of the mortgagor before foreclosure first originated in this court, and was confirmed in the Court of Appeals, and, finally, because it is a most just and reasonable doctrine, and has been so acknowledged throughout the history of the cases.¹

STOW v. TIFFT.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1818.

(15 Johns. 458.)

This was an action of dower, brought to recover dower in two lots in Douglas patent, in the town of Bolton, in the county of Warren. The tenant pleaded *ne unques seisie que dower*, and *ne unques accouplé in loyal matrimonie*. The cause was tried before Mr. J. Yates, at the Warren circuit, in June, 1817.

The marriage of the demandant, and the death of her husband

¹ This is the general rule in the United States but see *Stelle v. Carroll*, 12 Peters, 201 (1838).

in December, 1804, were proved. Timothy Stow, the husband of the demandant, purchased the premises in question during the coverture, and paid part of the consideration money; and to secure the payment of the residue, executed, at the time of receiving the conveyance, a mortgage of the same premises to the grantor; after his death the land was sold under a power contained in the mortgage, and was purchased by a person from whom the tenant derived his title.

A verdict was found for the demandant, subject to the opinion of the court, on a case containing the above facts.

Weston for the plaintiff.

Cowen, contra.

SPENCER, J., delivered the opinion of the court. The demandant's right to recover her dower depends on the nature of her husband's seisin. Timothy Stow, her husband, purchased the premises in question after his marriage with the plaintiff, and paid part of the consideration money; and for securing the residue, he, at the time of receiving his conveyance, executed to the grantor a mortgage of the same premises. After his death the premises were sold under a power contained in the mortgage, and the defendant holds under that sale. The question to be decided is whether there was such a seisin of the husband of the demandant as to entitle her to dower. This depends on the single point whether the seisin of the husband was an instantaneous seisin or not. If it was an instantaneous seisin, then, according to all the authorities, the wife is not endowable. This general position is met with in all our books, that the husband's seisin for an instant does not entitle the wife to dower. This is exemplified by the case of *Amcotts v. Cathrick*, Cro. Jac. 615. There the husband, who was seised in special tail, made a deed of feoffment to the use of himself for life, and after to the use of his son in tail, and made a letter of attorney to make livery. Before livery he took the demandant to wife, and after livery was made to those uses the husband died, and the question was, whether the wife was entitled to dower; and it was adjudged that she was not, for that the livery did not gain to the husband any new estate, but being *eodem instanti* drawn out of him, he gained no seisin whereof his wife was dowable; for that having no estate before the feoffment whereof the wife was dowable, he gained none by the feoffment of which his wife could be endowed. Three cases were there put in which the wife would not be entitled to dower: as where a tenant for life or a joint tenant makes a feoffment; so where a married man took a fine and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof, because, although he took it in fee, yet it is instantly out of him; so if a feoffment be made to one and his

heirs, to the use of another and his heirs, the wife of the trustee shall not be endowed, for he was the mere instrument and had but an instantaneous seisin (2 Co. 77).

The case of *Nash v. Preston*, Cro. Car. 190, would seem, at first view, to be opposed to the proposition that a deed to the purchaser and a mortgage given back by him to the grantor at the same time, would not entitle the wife of the purchaser to her dower; yet it is observable that the principle is admitted that an instantaneous seisin of the husband does not entitle the wife to dower. Croke admits that if a husband take a fine *sur cognisance de droit come ceo* and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him *quasi uno flatu* and by one and the same act. That case does not state that the redemise was made at the same time with the bargain and sale, and I presume it was not. That case, therefore, does not bear on the general principle.

I am authorized to say, by the decision of this court in *Jackson v. Dunsbagh*, 1 Johns. Cas. 95, that where two instruments are executed at the same time between the same parties relative to the same subject matter, they are to be taken in connection, as forming together the several parts of one agreement. I entirely agree in the opinion expressed by Ch. J. Parsons in the case of *Holbrook v. Finney*, 4 Mass. Rep. 569, that where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money at the same time that he executes the deed, that there the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms, with the principal deed to which it refers, but one contract, although it be by a distinct and separate instrument.

The substance of a conveyance where land is mortgaged at the same time the deed is given, is this. The bargainor sells the land to the bargainee on condition that he pays the price at the stipulated time, and if he does not that the bargainor shall be resealed of it, free of the mortgage; and whether this contract is contained in one and the same instrument, as it well may be, or in distinct instruments executed at the same instant, can make no possible difference. It is true that courts of equity have interposed to relieve the mortgagor against the accident of his nonpayment of the price, at the stipulated period. It is also true that courts of law have considered the interest of the mortgagor as liable to be sold on execution. This, however, does not interfere with the question as to how the contract between the original parties is to be viewed as between themselves when the equity of redemption is gone and forfeited.

The opinion which the court has formed receives decisive support from the declaratory act of the 28th sess. ch. 99. It recites that whereas doubts have arisen whether mortgages given to secure the purchase money of land sold and conveyed at the time of the execution of such mortgages, are to be preferred to judgments previously obtained against the mortgagors, for the removal whereof it is enacted and declared that whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser.

This statute conveys the sense of the legislature that the seisin of the mortgagor, under the circumstances stated in the act, was a seisin for an instant only; for it cannot be doubted that a judgment will attach on lands of which the judgment debtor becomes seised at any time posterior to the judgment; and nothing could prevent a judgment creating a lien on the subsequently acquired lands of the judgment debtor but the circumstance that his seisin, in the given case, was instantaneous. Surely, then, the analogous case of dower cannot stand on a better footing than a judgment unsatisfied. As a declaratory act, this statute is entitled to high respect; and it fortifies and supports the position that the demandant's husband acquired, by the deed to him, a seisin, which he parted with *eo instanti* he acquired it, and that his wife is not endowable of the premises. The court are very well satisfied that the law is so, for it would be extremely inequitable in most cases to claim dower on such purchases. We are, therefore, of opinion that there must be judgment for the defendant.

THOMPSON, Ch. J., dissented. The demandant, as the widow of Timothy Stow, deceased, claims her dower in lands purchased by her late husband after their intermarriage. He paid part of the consideration money and, for securing the residue, mortgaged the lands. After his death, the mortgaged premises were sold pursuant to the statute, and purchased by the person under whom the defendant claims; and the only question is whether the husband was so seised as to entitle his wife to dower.

In the case of *Hitchcock v. Harrington*, 6 Johns. Rep. 242, this point was stated, but not decided by the court. It has long been considered the settled law in this State, that a mortgage is a mere security for money, and the mortgagor is to be deemed seised, notwithstanding the mortgage, as to all persons except the mortgagee and his representatives. The seisin of the husband, in this case, cannot be considered that mere *instantaneous seisin* which the books speak of as not being sufficient to entitle the wife to dower. Those are cases where the husband is a mere conduit pipe, or

instrument of conveyance. This is evidently the meaning of Lord Coke, where the rule is laid down (Co. Lit. 31 *b*). It is more fully illustrated by Sir Wm. Blackstone, in his Commentaries (vol. 2, 131), where it is said that the seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him, as where by a fine land is granted to a man and he immediately renders it back by the same fine, such a seisin will not entitle his wife to dower, for the land was merely *in transitu* and never rested in the husband, his grant and render being one continued act. But if the land abides in him for the interval of but a single moment, the wife shall be endowed thereof.

Where a title is conveyed to a person and he gives back a mortgage, the fee is certainly vested in him, substantially and beneficially, and not nominally; otherwise the mortgage back would convey no title. The case of *Nash v. Preston*, Cro. Car. 190, is very much in point, to show that the widow is entitled to her dower. There was a bargain and sale of land to the husband, under an agreement that the bargainee was to redemise it to the bargainor and his wife, during their lives. The bargainee redemised and died, and his widow was considered entitled to dower. For, say the court, by the bargain and sale the land is vested in the husband, and thereby the wife is entitled to her dower. This question of instantaneous seisin is well considered by Gwillim, in a note to the late edition of Bacon, 2 Bac. Ab. 371, note. It is there said that the proposition that in the case of an instantaneous seisin the wife shall not be endowed, though laid down broadly by Coke, is by no means general; he confines it to cases where the husband is a mere instrument of passing the estate. The transitory seisin gained by such an instrumentality is not enough to entitle the wife to dower; but when the land abides in the husband for a single moment, as is said by Sir Wm. Blackstone, or, as a later writer explains it (*Preston on Estates*, tit. Dower), when he has a seisin for an instant beneficially for his own use, the title to dower shall arise in favour of his wife. The case of *Holbrook v. Finney*, 4 Mass. Rep. 566, has been cited and relied upon as in point against the claim of dower. Whatever respect may be due to the opinion of Ch. J. Parsons, he certainly stands unsupported by any adjudged cases to be found in the English books, or by any elementary writer when fairly explained. In none of the cases referred to by him in his opinion was the husband ever beneficially seised for an instant; and the distinction which he attempts to make between the case of *Nash* and *Preston* and the one before him, is certainly not well founded. In the case of *Nash* and *Preston*, the redemising was a part of the original agreement; yet the wife of the bargainee was held entitled to dower. So in *Holbrook* and *Finney*, the deed

and mortgage were executed in pursuance of a previous agreement to the same effect made between the parties. The two cases, therefore, in this respect are alike. Ch. J. Parsons seems fully to admit the law as laid down in *Nash* and *Preston*, and it is a little difficult to understand what he means by saying that the giving the deed and taking the mortgage back constitute but one act, unless the two deeds, being parts of the same contract, are but one act. But whatever importance may be attached to this circumstance, the argument cannot be applied to the case before us, because it formed no part of the original agreement that a mortgage was to be given back.

I do not see how our statute to prevent judgments having a preference to mortgages given to secure the purchase money, can in any manner affect this question. It is true that the first act (sess. 28, ch. 99) contained a recital purporting that doubts had arisen whether mortgages given to secure the purchase money of lands sold and conveyed at the time of the execution of such mortgages, are to be preferred to judgments previously obtained against the mortgagors, and then provides for giving a preference to mortgages thus taken. But this act has no relation to mortgages in any other respect than to give them a preference to judgments in that particular case. And it is to be observed that the right to sell land under a judgment, the lien created by such judgment, and the time such lien is to take effect, are all matters of statute regulation. This act only modifies the former statute and suspends the lien of judgments in such particular cases. But the right to dower depends on different principles. It would, no doubt, be competent to the legislature to take away or regulate the claim to dower in cases like the present; but until that is done, we must be governed by the common law rules on this subject, according to which I see no grounds upon which the claim to dower in this case can be resisted. I am, accordingly, of opinion, that the demandant is entitled to judgment.

Sed per Curiam

Judgment for the defendant.¹

¹ The cases generally are accord: *Thomas v. Hanson*, 44 Iowa, 651 (1876); even where the mortgage is made to a third person: *Clark v. Munroe*, 14 Mass. 351 (1817); *Jones v. Parker*, 51 Wis. 218 (1881).

POPKIN v. BUMSTEAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1812.

(8 *Mass.* 491.)

This was a writ of dower, to which the tenant pleaded in bar that Thomas Popkin, husband of the demandant, in his lifetime, viz. on the 30th of April, 1806, mortgaged the premises, in which the said Mary demands her dower, to one Thomas Capen for the payment of 3000 dollars, and that the demandant in and by the mortgage deed, for a valuable consideration, released to the said Capen all her right of dower in the mortgaged premises, and did thereby lawfully bar and exclude herself from all her right of dower therein forever; that Capen entered and became seized; that on the 9th of November, 1807 (the said Thomas Popkin having before that time died intestate), John D. Dyer was appointed administrator of said Popkin's estate, and, having obtained license to sell the real estate of his intestate for the payment of his debts, sold the equity of redemption to Abel Wheelock, by whom the same was conveyed to Bumstead the tenant; that he, the said Bumstead, on the 19th of Sept., 1810, paid to Capen, the mortgagee, the whole sum due by the mortgage, the same never having been paid by the mortgagor or his administrator; and that the said Thomas Popkin was never seized of the premises, or any part thereof, since the execution of the said mortgage deed.

To this plea the demandant, after oyer of the several conveyances mentioned therein,¹ replies that on the 19th of September, 1810, before she demanded her dower, and more than one month before the commencement of this action, the said Capen, the mortgagee, then having the sole right and interest in the said mortgage deed, did personally repair to the office of the register of deeds for the county of Suffolk, where the said mortgage deed was recorded, having received satisfaction and payment of all the sums due on the mortgage, and did then and there, in the margin of the record of said mortgage deed, acknowledge that he had received full satisfaction and payment for the premises therein mortgaged, and did quitclaim all his right, title and interest therein, and did then and there desire that the said record might be discharged, and did then and there sign said discharge and acknowledgment; and said

¹ The deeds from Dyer to Wheelock and from him to Bumstead purport a conveyance of the land, "subject to a mortgage made thereon by said deceased, and other rights claimed—viz., dower by the widow of said Thomas Popkin deceased."—Rep.

mortgage deed was thereupon cancelled and discharged according to the law in that case made and provided.

To this replication the tenant demurs generally, and the demandant joins in demurrer.

Parker, for the tenant, cited the case of *Fowler v. Shearer*, 7 Mass. Rep. 14, in which it was decided by this court that a wife may bar herself of dower, by joining her husband in a deed of conveyance, relinquishing her claim to dower, and putting her seal to the deed; and to shew that such a release in a mortgage shall enure to the purchaser of the equity of redemption he referred to the case of *Mosury v. Putnam*, Story's Pleadings, 359, 360, decided by this court in the county of Essex, November term, 1793.

Thurston, for the demandant, agreed that the release by her, set forth in the plea, would bar her as respects the mortgagee, and as long as the mortgage deed was in force. But the release of the dower was conditional, as well as the principal conveyance, and the discharge of the mortgage by the mortgagee or his assigns was a fulfilment of the condition and a cancelling of the mortgage (see Stat. 1793, c. 37, § 6). The tenant's claim is as the assignee of the administrator of the mortgagor; as such his right was to redeem the land by paying the money due and thus extinguishing the mortgage. This he did, and at the same time annulled the effect of the demandant's release of her right of dower, which was collateral and co-extensive with the mortgage. But if the tenant were considered as the assignee of the mortgagee, still the demandant has a right to redeem (*Finch's Prec. in Chan.* 137, 133; 2 P. Will. 716; 1 Eq. Ca. Abr. 219, 220). Neither does it appear that the tenant ever entered under the mortgage. The tenant, however, was not the assignee of the mortgagee.

The conveyances under which alone the tenant claims both recognize the claim of dower now set up by the demandant. He purchased the land subject to it, and he paid a consideration accordingly. In fact, he redeemed as the assignee of Dyer, the administrator of the mortgagor; and if Dyer had paid the mortgage, would it be contended that the demandant's claim would not have revived? The tenant resists that claim against all equity, since by the terms of his own purchase it was reserved; and if his plea is supported, great injustice is done to the demandant.

BY THE COURT. It has been contended for the demandant, upon the facts exhibited by the pleadings in this case, that her title to dower has revived and is as if she had never released it in the deed of mortgage. It would be singular if, when the tenant had paid the money due on the mortgage, and supposed that he had thus perfected his estate by extinguishing the only incumbrance he knew to exist upon it, he should by that act revive the claim of the

demandant, which she had before solemnly renounced under her hand and seal, and which, as he was under no obligation, it cannot be presumed he meant to do.

But the facts produce no such absurdity. When the tenant purchased the equity of redemption, it belonged to him to pay the money due on the mortgage, and thus rid his estate of that incumbrance. Having all the equitable interest in himself, when he had paid the money due by the mortgage the legal estate followed the equitable interest, and he became seized of the whole fee simple. If this were not the plain legal operation of the transaction, the law would construe the discharge of the mortgage by the mortgagee a release of the legal estate by him to the tenant, who had become lawfully possessed of the equitable interest, and from whom the consideration for that discharge flowed, rather than such a mischief should follow.

Replication adjudged bcd.

EATON v. SIMONDS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1833.

(14 *Pick.* 98.)

This was a bill in equity to redeem certain mortgaged real estate in Boston.

The bill alleged, that the complainant was, on May 16, 1805, married to Nathan Eaton of Boston; that during the coverture he became seised of the premises, and on October 22, 1819, mortgaged them to Lucy Ridgway, in order to secure the re-payment of the sum of \$1000 borrowed of her and which was payable in two years with interest; that the complainant became a party to the conveyance, so far as related to her right of dower; that on or about April 26, 1823, the sum so borrowed not having been fully repaid, the equity of redemption was attached by a deputy sheriff upon an execution issued on a judgment recovered against the mortgager, and by virtue of such execution was sold by auction to the respondent; that the respondent, having on May 26, 1823, obtained a conveyance thereof from the deputy sheriff, took possession of the premises, and has ever since continued to take the rents and profits thereof; that on or about January 3, 1824, the respondent obtained an assignment of the mortgage from Lucy Ridgway; that on August 31, 1828, the mortgager died; that upon his death, the complainant became entitled to dower in the premises, subject only to such mortgage, and had lawful right to redeem upon tendering

payment of the amount due thereon; that on April 3, 1829, the complainant demanded of the respondent an account of the sum due on the mortgage and of the rents and profits, in order that she might make such tender, but that the respondent had unreasonably refused to render any account whatever; that although the respondent entered into possession of the premises under the purchase of the equity, yet he never made known that he had taken possession, in the presence of two credible witnesses, for a breach of the condition of the mortgage and for the purpose of foreclosing, and that no notice was ever given to her of any intention on his part to make such entry; that the respondent sometimes pretends that in November, 1811, Nathan Eaton mortgaged the premises to William Eaton, to secure the payment of divers promissory notes payable by Nathan to William, and that afterwards, three of the notes remaining unpaid, the same were assigned together with the mortgage to George Blake, Esq., a counsellor of this Court, and that the complainant, by joining in such mortgage and thereby relinquishing her right of dower, is now barred therefrom, as well as from any right of redeeming the premises; but the complainant charges that all the sums due upon such mortgage were paid by Nathan Eaton, and that afterwards Blake discharged the same in the margin of the record in the registry of deeds, and that the mortgage was thereby extinguished. Wherefore the complainant prays that the respondent may state the amount of the mortgage to Ridgway and of the sums paid thereon; that an account may be taken of the rents and profits, and if it shall appear that they have been more than sufficient to satisfy the principal and interest of such mortgage, that the residue, or her just proportion thereof, may be paid over to the complainant; that the complainant may be permitted to redeem the premises, and have her dower set out therein, she hereby offering to pay such sum as shall be due to the respondent; that he may be ordered to deliver up possession of the premises to the complainant; and that she may have such other and further relief, &c.

The answer denies that the mortgager was so seised of the estate as is alleged in the bill, or that the complainant has any right to redeem the same, and alleges that on November 7, 1811, William Eaton sold and conveyed the premises in fee to Nathan Eaton, and that the mortgage to William, which is referred to in the bill, was made at the same time to secure the payment of a portion of the purchase money; that Nathan Eaton died without ever having paid or tendered to the respondent the sum paid by him on the purchase of the equity of redemption, amounting to \$1750 with interest, or in any manner redeemed or attempted to redeem such equity, and without ever having paid or satisfied the sums secured by either of

the mortgages, or procured them, in any manner, to be discharged; that on July 22, 1823, it was agreed between Blake and the respondent that Blake should transfer to the respondent the notes and mortgage so assigned to Blake by William Eaton, and that the respondent should pay to Blake the principal and interest due thereon, amounting to \$722.68; that on the same day the respondent, having paid this sum in pursuance of this agreement, expected and claimed an assignment of the notes and mortgage, but that Blake declared that any assignment thereof would be unnecessary, inasmuch as the respondent had purchased the equity of redemption; that thereupon Blake discharged the mortgage so assigned to him, upon the margin of the record in the registry of deeds, for the benefit of the respondent; and that neither Nathan Eaton, nor any one in his behalf, ever paid such sum to Blake, or any part thereof, or in any manner caused such mortgage to be so discharged; that the several notes aforesaid, and the interest accrued thereon, still remain due to the respondent; and that by reason of all these facts, purchases, &c., and the lapse of time after the purchase of the equity of redemption and before the death of Nathan Eaton, the respondent had an absolute and irredeemable estate in the premises.¹

The court ordered that, on the coming in of the answer, the cause should be referred to one of the masters in chancery, to examine and state the amount due on the mortgages, with the circumstances appearing on record or otherwise, in relation to the discharge or assignment of them or either of them, the amount of the rents and profits which have been or might have been made of the premises, and the amount laid out in necessary repairs and betterments by the respondent since he came to the possession thereof.

On June 8, 1830, the master made his report.

WILDE, J., delivered the opinion of the court. This case comes before us on exceptions taken by both parties to the report of the master; but the principal question depends upon the facts appearing by the bill and answer. The question is, whether the plaintiff is entitled to dower in the estate described in the bill; and if so, upon what terms she may enforce her claim in a court of equity. That she has an equitable claim of dower is fully settled by the decision in the case of *Gibson v. Crehore*, 5 Pick. 146. It was decided in that case, and so it had been frequently held before, that a widow is dowable of an equity. And although she cannot maintain an action at law against the mortgagee or his assignee, after having joined her husband in a mortgage, relinquishing her right of dower, yet if the mortgage is not foreclosed a court of equity will interpose and allow her to redeem.

¹ A portion of the case, not relevant to the main question, is omitted.

The question then is reduced to this, namely, whether the plaintiff, to entitle herself to dower, is obliged to redeem, or to contribute her share to redeem, both of the mortgages mentioned in the bill. The plaintiff admits in her bill that she is bound to redeem the mortgage to Lucy Ridgway, that mortgage having been regularly assigned to the defendant. But she denies her liability to redeem the other mortgage, given to William Eaton, because this mortgage, as she avers, has been paid and discharged, and is no longer an existing incumbrance on the premises. The answer admits that this mortgage was assigned to George Blake, Esq., and that the defendant has paid the full amount due thereon to Blake, and that Blake thereupon discharged the mortgage upon the margin of the record thereof, for the benefit of the defendant. But this discharge, the defendant's counsel contend, will operate as an equitable assignment, as it was so intended to operate by the parties; and that the union of the legal and equitable titles may well exist without producing the effect of a merger, or the extinguishment of the mortgage. Perhaps this might be so, if the discharge could be considered as an assignment of the mortgage.

The general principle is that when the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties (*Gibson v. Crehore*, 3 Pick. 482). But Chief Justice Savage remarks, in the case of *Coates v. Cheever*, 1 Cowen, 460, "that the spirit of the cases seems to be this; that where the tenant in possession enters by virtue of a purchase from the mortgager, then the subsequent purchase of the mortgage by him is an extinguishment." And that case was decided upon that principle. The same principle is laid down in *James v. Morey*, 2 Cowen, 301, and in other cases (*Forbes v. Moffatt*, 18 Ves. 390; *Gardner v. Astor*, 3 Johns. Ch. R. 53). The rule at law is inflexible, that where a greater and a less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated or merged; and the same rule applies to the union of the legal estate with the equitable interest. But this rule is not inflexible with courts of equity, but will depend on the intention and interest of the person in whom the estates unite.

In the present case, however, the doctrine of merger is not applicable, for the estate in the mortgage of William Eaton was never assigned to the defendant, and never vested in him; so that it could not unite with the equitable title in him, so as to operate as a merger. But this mortgage has been legally discharged, the debt has been paid, and can no longer be set up as a subsisting title.

either at law or in equity. It makes no difference that the defendant was advised and supposed that a discharge of the mortgage would be equally beneficial to him as an assignment. This was a mistake, which, however, this court has no power to correct.

With regard to the exceptions to the master's report in stating the account, we think two of them are well founded and are to be allowed.

The plaintiff excepts to the allowance of a commission to the defendant on the rents and profits, he having occupied the premises in person during the whole time. The rule is, that a mortgagee in possession, who manages the estate himself, is not to be allowed for his own care and trouble; otherwise, if he employs a bailiff, or lets the estate to a tenant; and so is the rule in England (*French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 Atk. 518; *Bonithon v. Hockmore*, 1 Vernon, 316).

We are of opinion also, that the master erred in charging the defendant with the rents and profits during the life of the plaintiff's husband. He had a right to possession and to the rents and profits, as against the husband, under his purchase of the equity, and it does not appear that he ever entered under the mortgage in question; nor had he any right to enter, the same having been discharged. Nor does it appear that he entered under the other mortgage. The plaintiff in her bill avers that the defendant entered under his purchase of the equity and never gave any notice of his entry under the last-mentioned mortgage. This case, therefore, on this point, materially differs from that of *Gibson v. Crehore*. We think, however, the defendant is liable to be charged with the rents and profits from and after the death of the husband, for he could not hold under the purchase of the equity against the plaintiff, and he is to be presumed to hold under his legal title. The defendant's charge for repairs is also to be limited to the time since the death of the husband.

These two exceptions are to be allowed, and the others are disallowed, and the account is to be corrected accordingly.

The court having made a decree in conformity with this opinion, a motion was now made on the part of the respondent, to vary and rectify the minutes of the decree, on the following grounds: 1. because the decree supposes that the mortgage to Eaton, which was allowed by the master as a just charge upon the estate, was to be considered as extinguished; 2. because no exception was taken by the complainant to the allowance of such mortgage by the master; but on the contrary, the complainant having excepted to the allowance by the master to the respondent of a commission for collecting rents, prayed that the residue of the master's report might be confirmed.

WILDE, J., delivered the opinion of the court. Since an opinion was given in this case, the defendant has moved the court to rectify the minutes of the decree, on the suggestion that no exception was taken to the report of the master, in which the mortgage to William Eaton is stated as a subsisting and valid mortgage.

We were somewhat surprised at this suggestion, because not only was there such an exception in the copy furnished to the court, but it appears from the plaintiff's bill that she denied, in the outset, that this mortgage was a subsisting mortgage, which she was bound to redeem; and it hardly can be supposed that her counsel would waive so important an exception. How the fact was, however, does not appear, for the counsel do not agree, and we do not think it important to inquire further, for if the plaintiff's counsel did omit to file the exception to the master's report in season, we think the question as to the discharge of the mortgage, and whether or not it could be considered as assigned to the defendant, was open for the consideration of the court upon the bill and answer.

The answer expressly admits all the facts which have any bearing upon that question; and although the master was authorized to examine and state the facts and circumstances appearing on record or otherwise, in relation to the discharge or assignment of the mortgages mentioned in the bill, yet he was not empowered to decide upon those facts, except incidentally by stating an account of the sum due on the mortgages, with an account of the rents and profits and the repairs, &c. The reference was made out of the ordinary course and before the answer was filed, for the purpose of expediting the final decision of the cause; but it was not intended to authorize the master to decide the question whether the first mortgage was discharged or not, but to report facts. This then, we think, was an open question, and was, as it still seems to us, rightly decided. We have, however, examined the cases cited by the defendant, but do not find that they impugn, in any respect, our former decision, excepting perhaps the case of *Popkin v. Bunston*, 8 Mass. R. 491; and that is distinguished from this, in an important particular. The defendant in that case had purchased of the administrator of the mortgager, and thereby acquired the same rights which the administrator would have had if he had paid off the mortgage for the benefit of the heirs. The mortgage was paid off after the death of the mortgager, when the widow's right of dower had become perfect, and it might therefore be supposed that she was not entitled to dower without contributing her share of the redemption money, and that the case came within the principle laid down in *Gibson v. Crechore*, that where several are interested in an equity of redemption and one only is willing to redeem, he must pay the whole mortgage debt; and in such case

he is, in a court of equity, considered as assignee of the mortgage and as standing, after such redemption, in the place of the mortgagee in relation to the other owners of the equity.

Unless the case of *Popkin v. Bumstead* can be supported on some such distinction, it is difficult to perceive any legal or equitable ground on which it can stand. It is difficult also to say how that case could be decided on rules of equity, it being an action at law; but unless the principle of contribution does apply, the case seems opposed to the whole current of the authorities.

In the present case, the plaintiff clearly was not bound to contribute to the redemption of the first mortgage when it was paid off and discharged. That was done during the life of the husband, and clearly the wife then was not bound to contribute, and the husband was not bound to repay the mortgage debt, unless he saw fit to redeem the equity. The defendant therefore redeemed in his own right. He bought the equity subject to these mortgages, and there seems to be nothing inequitable in holding him bound to redeem them.

In the case of *Swaine v. Perine*, 5 Johns. Ch. R. 482, it is decided by Chancellor Kent that, if the heirs pay a mortgage, the wife shall contribute as to the amount paid by the heirs, but that, as far as the husband had reduced the mortgage in his lifetime, that was doubtless so far a reduction for the benefit of the wife as well as himself. The same rule will hold where payment is made by the assignee of the husband during his lifetime; and this is decisive in the present case.

*Motion to vary the minutes overruled.*¹

VAN DYNE v. THAYRE.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1838.

(19 Wend. 162.)

This was an action of ejectment for dower, tried at the Yates circuit in November, 1836, before the Hon. Daniel Moseley, one of the circuit judges.²

The plaintiff claimed to recover dower in the premises in ques-

¹ See *Snow v. Stevens*, 15 Mass. 278 (1818); *McCabe v. Swap*, 14 Allen (Mass.) 188 (1867); *Carter v. Goodin*, 3 Oh. St. 75 (1853), and compare *Brown v. Lapham*, 3 Cush. (Mass.) 551 (1849).

² Only so much of the case and opinion as have to do with the question of dower are here given.

tion, as the widow of Dennis Van Dyne, with whom she intermarried in 1824. On the 15th December, 1818, the premises in which dower was claimed were conveyed to her husband by one Morris Seely; her husband took possession and remained in until 1829, when he quit, leaving a person in possession as his tenant; her husband died in 1832. The defence set up was that Van Dyne, on taking his deed, executed a mortgage of the premises in question to one George D. Stewart, as part consideration of the purchase, conditioned for the payment of \$2,512 in instalments, the last instalment falling due in June, 1824; that the possession of the premises had been surrendered by the mortgagor in his lifetime to the heirs of George D. Stewart, and that the present defendant held under them. . . . The question of fact principally controverted was in relation to a release of the equity of redemption alleged by the plaintiff to have been executed by her husband to the heirs of Stewart in consideration of a discharge from the mortgage debt; whereby she contended that the mortgage was extinguished, that the heirs of Stewart were in possession as purchasers and not under the mortgage, and that consequently she was dowerable. On the other hand, it was strenuously insisted by the heirs of Stewart that such release had not been executed. The court, as will be seen in the opinion pronounced in this case, assume that such release was executed by the husband of the plaintiff. The judge charged the jury that it was immaterial whether the heirs of Stewart entered under a deed or not, if they entered claiming under the subsisting lien of the mortgage; and instructed them that if they were satisfied that the alleged mortgage had been executed by Van Dyne, that the same had become forfeited, that the defendant was in possession under Stewart's heirs, and that the defendant was entitled to a verdict. The plaintiff excepted to the charge. The jury found for the defendant, and the plaintiff now moved for a new trial on a case made.

J. A. Spencer for the plaintiff.

H. Welles for the defendants.

By the Court: COWEN, J. . . . The remaining question respects the charge of the judge that though Stewart's heirs may have entered under a deed, yet if they also claimed under the mortgage, they are protected against this claim of dower in the husband's equity of redemption. If a deed or lease of the husband's equity of redemption to the mortgagee or his heirs have the effect to destroy all claim under the former and paramount fee arising upon the conveyance by mortgage, there can be no doubt that such mortgagee or his heirs would be estopped, like any other grantee of the husband, to deny the widow's right of dower. It is equally clear, on the other hand, that where one comes in, either as mortgagee or

under a foreclosure, he can hold against the widow; in the former case qualifiedly, in the latter absolutely (*Van Duyne v. Thayre*, 14 Wendell, 233). The case presented by this defence is that of a deed and an entry under it, accompanied with the declaration of an intention still to cling to the mortgage as a protection against liens which might by priority of time overreach the deed. The power and right to accept a deed and enter thus qualifiedly would be perfectly clear in equity (*James v. Morey*, 2 Cowen, 246, 285, 287, 300, 303, 4, and the cases there cited, with several cases which will be hereafter noticed). See also *Freeman v. Paul*, 3 Greenl. 260. But we are sitting in a court of law, and are put to inquire how far we can sanction the defence in this place.

That the widow is dowable of an equity of redemption is agreed perhaps in all the States of the Union (4 Kent's Comm. 44, 3d ed., and the cases and statutes there cited; *Walker v. Griswold*, 6 Pick. 416). When that is to be treated strictly as an equitable estate, her proper remedy is in a court of chancery. See 4 Kent's Comm. 44, 3d ed., and the cases there cited. But she also has a remedy at law in all those cases where this estate can be properly considered as legal. When it is so, and to what extent and under what restrictions the legal remedy is applicable, it becomes proper to inquire.

There can be no doubt that a conveyance in any form of the husband's equity of redemption, though it arose upon a mortgage given by him before coverture, would be altogether ineffectual as a bar of dower, when set up by his mere assignee against his widow. As between the widow and assignee, the equity of redemption would be looked upon as a legal estate. Being disconnected with the title of the mortgagee, he shall never, in answer to a claim of dower, be allowed to set up the mortgage as an outstanding title. As a defendant claiming under the husband by a conveyance subsequent to the coverture, he stands absolutely estopped to deny the paramount right of the widow. In short, the mortgage is, for all purposes of defence, to him a nonentity (*Harrison v. Eldridge*, 2 Halst. 392; *Snow v. Stevens*, 15 Mass. R. 278; *Barker v. Parker*, 17 *id.* 564). All this was held, too, in *Hitchcock v. Harrington*, 6 Johns. R. 290, and *Collins v. Torry*, 7 *id.* 278, and to all this there can obviously be no objection. Both those cases and all the cases at law agree, however, in the qualification that, as against the mortgagee, the husband is not so seised that his widow can claim dower; and they introduce, I think, even a farther qualification, that if the mortgagee shall have entered for condition broken or foreclosed, the seisin is destroyed and the husband's assignee could then defend himself on the ground of an outstanding title. Chancellor Kent says (4 Kent's Comm. 45, 3d ed.), "As against the title under the mortgage the widow has no right of dower, and

the equity of redemption is entirely subordinate to that title." Accordingly when this cause was here before, the deed from Van Dyne to Stewart's heirs being out of question, the court, after holding that Van Dyne's admissions, though made during coverture, were receivable against his widow as secondary evidence of the mortgage, put the defence on the simple and consistent ground that the mortgagee's heirs having entered under the mortgage and the defendant claiming under them, his title was clearly the better one. Indeed, all seisin in the mortgagor was thus utterly subverted. Under these directions the cause went down to a second trial.

On the second trial, which is now under review, after the mortgage was shown, and that it was forfeited, and that the heirs of the mortgagee had entered, the plaintiff sought to defeat the effect of this evidence by proving in reply that not only was there a mortgage unsatisfied to a large amount, but that her husband had besides given to Stewart or his heirs an absolute deed in fee to satisfy the debt under a mutual arrangement between the parties, and that the heirs entered under that deed. To an unsophisticated mind such an answer would seem to be a most extraordinary one; yet these very heirs seem, from the beginning to the end of this cause, to have shrunk from the deed as an instrument of destruction. It was kept entirely out of view on the first trial; and now, after the second, they make a point that there was no deed in evidence; and the plaintiff insists, with apparent triumph, that by the operation of this deed she stands an unincumbered claimant of that dower which she could have taken only in a qualified way had the mortgage been left to stand alone. All this, too, is claimed as the result of *Hitchcock v. Harrington*, and *Collins v. Torrey*, or more particularly of the latter case, when taken in connection with the general doctrine of merger as established in *James v. Johnson*, 6 Johns. Ch. 423, and recognized in the s. c. by the title of *James v. Morey*, 2 Cowen, 246. It seems to me here has been some misapprehension, at least, of the decided scope of the authorities. With regard to the latter case and its kindred class of decisions, they merely hold that at law and generally in equity the union of a legal and equitable estate in the same person (like that of the estate of mortgagor and mortgagee in this instance) extinguishes, or, as the phrase is, merges the equitable in the legal estate (4 Kent's Comm. 101, 2, 3d ed. and the cases there cited). In other words, as I understand it, the legal estate becomes absolute. This notion was applied exactly in that way by Mr. Justice Story in *Dexter v. Harris*, 2 Mason, 531, 539. "At law," says he, "by the mortgage a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich (of the mortgagor's title to the mortgagee) would be to extinguish the equity of redemp-

tion, and thus remove the condition. If that conveyance was good, it had the effect, not to enlarge the estate, but to extinguish a right. It was not the drowning of a lesser in a greater estate, for the estate was already a fee simple; but it was an extinguishment of a condition or equity." The same was held in *Carll v. Buttman*, 7 Greenl. 102. Such an effect, I should apprehend, would do very little injury to Stewart's mortgage here. It does not necessarily even extinguish the debt (*Spencer v. Harford's Ex'rs*, 4 Wendell, 381). The upshot is that the mortgagor released all his right in the equity of redemption, and the heirs enter under an absolute instead of a qualified title. The dispute is about words. All this is called a merger; of what? of the legal estate? Who ever heard of a legal estate being merged in an equitable? The legal estate is always too strong for that. No one will say that both estates are merged. It would be still more extraordinary that one holding in himself all legal and all equitable right should be upset by the very perfection of his title; and yet it is said that was held in *Collins v. Torry*. In that case the demandant's husband conveyed the equity of redemption to Parsons, who conveyed to Winston, who conveyed to the defendant with warranty. Winston's administratrix purchased and took an assignment of the mortgage; and the court do say that such an union worked an extinguishment of the mortgage. Had Winston himself, who held the fee, taken the assignment, it would certainly, within all the cases, have extinguished the equity of redemption and carried the title to him. In that sense the mortgage would have been extinguished, as the court say, because the fee would have become absolute. That very point was held in *Gibson v. Crehore*, 3 Pick. 475; 5 *id.* 146, s. c. and s. P. There, under an order of court, the husband's administrators conveyed his equity of redemption to the defendant, who purchased and took an assignment from the mortgagee, and then the widow came for her dower absolutely, as in *Collins v. Torry*. All our cases of dower and merger were cited in her support. The court repudiated her claim at law. Parker, Ch. J., said, in 3 Pick. 480, 481, if she were right in her claim the defendant would be a great sufferer, and the widow would gain an unjust advantage. He adds: "Several cases have been cited to show that widows are entitled to dower in the equity of redemption of mortgaged estates; and without doubt they are against all but the mortgagee and those claiming under him, and they may enforce their claims at law. So, also, if the mortgage is discharged by the husband in his lifetime, or by his executors or administrators out of the proceeds of his estate, the right of the widow, which had been suspended, revives, and she may proceed to recover her dower, just as if there had been no mortgage. But against the mortgagee or his assignee,

her right is only in equity, and it is only by a bill in equity, and by paying her due proportion of the debt, that she can avail herself of her right," &c. The chief justice mentions a still stronger and more decisive case from 8 Mass. R. 491, *Popkin v. Bumstead*, which I will also state in his words: "The assignee of the mortgagor paid the debt to the mortgagee, and the latter entered a discharge of the mortgage on record; but the widow was held not entitled at law to her dower, because it would be to defeat the very purpose of the payment by the assignee, which was to give assurance to his own title." In *Coates v. Cheever*, 1 Cowen, 475, the case of *Collins v. Torry* is recognized as holding that a purchase of the equity of redemption and entry into possession, followed by an assignment from the mortgagee to the purchaser, shall extinguish the mortgage and entitle the widow to dower; and the court followed the doctrine to that extent without going back to look at the nature of the extinguishment. The case there adjudged is not like the one now before us, but it certainly shows *Collins v. Torry* as well as itself to be in conflict with the cases decided by the Supreme Court of Massachusetts, which appear to me to contain the true doctrine. The more *Collins v. Torry*, on which *Coates v. Cheever* was founded, shall be considered, the more, I venture to say, it will be found to have been without full consideration. In truth, there is no merger or extinguishment presented by that case, in any sense of the term. The legal and equitable estates never were united in the same person, unless we should hold that land descends to the personal representative. Winston, an assignee of the husband, having conveyed the equity of redemption with warranty to the defendant, died, and his administratrix, not his heir, purchased and took an assignment from the executors of Fonda, the mortgagee. I admit this was probably done to save her husband's estate from liability on the warranty to the defendant. It is strange that an act thus done in good faith and with intention to save the estate should have been made the very ground of a recovery against her deceased husband's grantee. If there be anything in the cases when they say that the equitable sinks into the legal estate, and the latter thereby becomes strengthened or becomes absolute, then all the cases which have ever been adjudged concur in principle to one end: they all concede that, as against the mortgagee or his assignee, or any one claiming under him, there can be no dower in an equity of redemption (4 Kent's Comm. 45, 3d ed. and the cases there cited). What is the estate of the husband at law as against the mortgagee, even while in actual possession under this equity of redemption? At most he is a tenant at will, and after he shall have parted with all that right by assigning his equity to the very mortgagee, it sounds most extravagant to say that such an act shall add

to his estate. Such is the consequence, if we allow the plaintiff's argument; for the widow claims out of that estate. If the husband had done his worst, the heirs of Stewart, by entering as mortgagees, could hold in despite of the plaintiff. By doing better, conveying all his interest and turning the mortgage to the heirs into an absolute fee, it is insisted that the fee thus created runs back into himself and creates a seisin whereof his widow is dowable. To my mind this is a new mode of conveyance, where a man in doing all he can to convey his estate becomes himself the grantee. I am sure that in parity of reasoning his heirs might have ejectment; but there is no pretence for such a consequence. If it does not add to, it certainly does not diminish the estate of the heirs (*Stoppelbien v. Shulte*, 1 Hill's Cas. on Ap. 200).

But the principles, so well supported by reason and authority, have been directly applied by this court to a case which cannot be distinguished from the case at bar. In *Jackson, ex dem. Bruyn, v. Dewitt*, 6 Cowen, 316, it was held that the husband may release the equity of redemption to the mortgagee or his assignee, and thus extinguish the wife's dower. This court held, in the spirit of all the cases, that, so far from reacting for the benefit of the widow, such a release to the assignee of the mortgagee who held the legal estate, did, to be sure, extinguish the mortgage, but it made the legal estate absolute. It is true the case is slightly distinguishable in its details. The husband had purchased and given back the mortgage to secure the purchase money before coverture, and the court say, on the authority of *Stow v. Tifft*, 15 Johns. R. 458, that he was seized but for an instant. The simple amount of the case is, however, precisely like all others which are raised against the mortgage. The husband was disseised. How? By a conveyance of the legal estate to the mortgagee. What possible difference whether he was seised and disseised the same day, or seised one day and disseised ten years after, if both seisin and disseisin were before coverture? None at all, and so it was held in *Bird v. Gardner*, 10 Mass. R. 364. I repeat again, on all the authorities, that, as against the mortgagee, there is no seisin. Entry or foreclosure is a bar, and the two cases last cited hold that a release of the equity of redemption by the husband is equivalent to a foreclosure. Strange he should not be allowed to do thus voluntarily what a court of chancery would decree. My deduction from this and other cases I state in the words of Chancellor Kent, 4 Comm. 45, 3d ed.: "The wife's dower in an equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives; and not when the equity of redemption is released to the mortgagee or conveyed." And see *Bolton v. Ballard*, 13 Mass. R. 227, and *Reed v. Morrison*, 12 Serg. & Rawle, 18.

Remember, we are speaking in a court of law, to which we professed in the outset to limit our inquiries. If there be a remedy for dower against the mortgagee in any case, or those claiming under him, it is extremely proper that the widow should be confined to a court of equity; and that distinction has recently been held in the case of *Smith v. Eustis*, 7 Greenl. 41, 43, upon a consideration of many authorities; again in *Carll v. Bullman*, *id.* 102. And in *Gibson v. Crechore* the plaintiff, failing at law (3 Pick. 415) was afterwards relieved in equity (5 *id.* 146). That a case of this kind may often be open to very complicated equities and altogether unfit for a court of law, is plain enough on the least reflection; and it is strikingly illustrated by the last cited case. See also *Eaton v. Simonds*, 14 Pick. 98.

It follows that in any view the charge of the circuit judge was altogether unobjectionable on the part of the plaintiff. I entertain no doubt that he would have been right in putting the matter to the jury without regard to the entry being under the mortgage. The case is all which it was when here before. Mr. Justice Nelson then said: "I have no doubt it was competent for the heirs to set up their possession as representing the legal estate in the mortgaged premises." I add, such a right in the heirs is made stronger—it is not necessary to say precisely how much stronger—by the deed which the plaintiff now insists upon.

A new trial must be denied.

EVERSON v. McMULLEN.

COURT OF APPEALS OF NEW YORK, 1889.

(113 N. Y. 293.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 13, 1887, which affirmed a final judgment in favor of plaintiff, entered upon a decision of the court confirming the report of a referee, and also modified and affirmed, as modified, an interlocutory judgment.

This action was brought by plaintiff, as the widow of Morgan Everson, to recover dower in certain premises.

On the trial the court held that plaintiff's dower interest should be charged with its just proportion of a mortgage in which she joined with her husband, which is set forth in the opinion, and

an interlocutory judgment was entered accordingly, referring it to a referee to admeasure the dower. The General Term, on appeal from the interlocutory judgment, modified it, adjudging that the mortgage was not to be considered in the admeasurement.

The material facts are stated in the opinion.

FINCH, J. We are required to settle on this appeal the disagreement between the trial court at the first hearing and the General Term, and determine which decision was correct.

The property in question was owned originally by Morgan Everson, who mortgaged it to the Rondout Savings Bank for \$12,000; his wife, who is the present plaintiff, joining with him in the mortgage to cover her inchoate right of dower. Everson died soon thereafter, and his executor sold the equity of redemption at public auction for one dollar. The case does not disclose the authority upon which he acted, but nobody disputes it, and the action was tried upon the assumption that a valid title existed in the purchaser. That purchaser was Coykendall, who assigned his bid to Preston, to whom the executor's deed was made. Preston took title before August, 1877, and thereupon gave a new mortgage to the savings bank upon the property for \$2,000 to further secure an accumulation of interest upon the original mortgage. It appears that Preston gave a bond accompanying the mortgage, and so became personally liable for a possible deficiency, and the bank gained that additional security for its unpaid interest; but while it is said generally that the mortgage was given to pay the interest, it is not shown that the mortgagee accepted the new securities as a payment *pro tanto* upon the original incumbrance by any indorsement or equivalent action, or held them in any other way than as collateral to the original debt. In August, 1877, Preston and his wife conveyed to Crosby by a quit-claim deed, but containing a provision by which the latter assumed and agreed to pay the \$2,000 mortgage given by Preston to the bank, as a part of the consideration for the purchase. The consideration named in the deed was \$221. Preston did not on his purchase assume or become liable to pay any part of the original mortgage, but took title merely subject to its lien. When he gave his \$2,000 bond and mortgage it was in aid of his own title, and not in pursuance of any duty due to the representatives of the mortgagor. Probably his obligation was merely collateral to the primary lien, and so both he and his land became sureties for the unpaid interest; but if not, and the new mortgage was a payment of so much of the old debt, it was entirely voluntary, and he, and Crosby who took his place, stood in the attitude of sureties after paying the unpaid interest, entitling them to subrogation as against the land. Crosby thereafter conveyed a portion of the property to McMullen by a warranty deed, free

and clear of all incumbrance. He was enabled to do this by an arrangement at the time, to which his grantee and the bank were parties. The substantial point of that arrangement was a distribution of the original mortgage in agreed proportions between the two parcels into which, by McMullen's purchase, the land was to be divided. To effect this separation and severance of the lien, McMullen gave the bank a mortgage on his parcel for \$5,500 as a substitute for \$4,000 of the principal of the original mortgage, and of the unpaid interest collaterally secured by the bond and mortgage of Preston, \$500 of the interest having been paid in cash by Crosby. The bank on its part formally released McMullen's parcel from the lien of its original mortgage, indorsing thereon a payment of \$4,000, and cancelled and discharged the \$2,000 mortgage of Preston, and Crosby was thus enabled to make his conveyance free from incumbrance.

On this state of facts the widow demanded dower in McMullen's parcel. The Special Term, on the first trial, held that she was bound to allow as against her dower a just proportion of the original mortgage and its interest, and sent the case to a referee to ascertain that just proportion, with a direction that the McMullen mortgage should be recognized and allowed in ascertaining the amount of such indebtedness. The General Term, on the contrary, were of opinion that the widow was not bound to contribute, and should have dower in the whole parcel without allowance or diminution; and it is that controversy which awaits our judgment. It is not doubtful on which side the equity exists. The widow subordinated her dower to the payment of the husband's debt. Whoever, in the room of a foreclosure by the mortgagee, pays that debt to him when under no personal liability for its discharge, is entitled in equity to the protection of the mortgagee's right as against the dower which it covered and charged. The purchaser from the husband acquired only the equity of redemption. While, technically, he took the fee, in truth he took it subject to the interest of the mortgagee carved out of it by the mortgage as a lien. Payment to the mortgagee in an equitable sense, is a purchase of that interest from him, and in equity the owner of the fee holds it under the mortgagee as to that interest, and under the husband only as to the equity of redemption. That is an answer to the doctrine invoked by the respondent that a release of dower is available only to one who claims under the very title which was created by the conveyance with which the release is joined (*Malloney v. Horan*, 49 N. Y. 118). That would be a good answer to the appellant's claim in a court of law, possibly, but does not govern his case in equity, since there the truth of his holding, outside of the legal form, is under the mortgage to the extent of the mortgage debt. For his payment

of that debt is not a duty which he owes to the husband's estate or to any one, but a transaction in his own interest, the exact and obvious purpose of which is to add the right of the mortgagee to the right bought of the husband. The widow is left where her own voluntary act placed her. By joining in the mortgage she postponed her dower to the equity of redemption. She has that right still, and seeks to enlarge it because of a payment made not by her husband, or in performance of a duty due to him or those representing him, but by one acting wholly in his own interest and seeking to add to that as acquired from the husband the further right held by the mortgagee. The purchaser in the present case took his land charged as surety for the husband's debt. While he, personally, was not bound to pay it, his land was held, and paying the debt of husband and wife, as represented by the mortgage, he had a right, as against them, to be subrogated to the position of the mortgagee and to stand in equity as the purchaser and holder of his security.

Thus far I have assumed that the giving of the new mortgage operated as a payment, *pro tanto*, of that held by the bank. That is a needless concession, because the finding in this case rebuts any intention of payment, and establishes that a severance of the original lien was all that was contemplated by the parties, and the giving of the new mortgage was meant, in its practical effect, to serve as a transfer of so much of the original lien to the severed parcel. Equity may look through the form of the transaction to ascertain its substance, and so looking cannot fail to see that the new mortgage is so much of the old one in a changed form, but secures the old debt as did its predecessors. The finding is justified by the facts, and upon that basis the dower remains subject to the proportionate part of the original lien.

I think these views are fully sustained by the authorities. In *Swaine v. Perrine*, 5 Johns. Ch. 491, the mortgage given by the husband and wife was outstanding at his death; the equity of redemption passed to the heir who redeemed the land by paying the mortgage, and the widow who claimed dower was required to contribute her ratable proportion of the redemption money. In *Popkin v. Bumstead*, 8 Mass. 491, the husband and wife joined in a mortgage to one Capen, and after the death of the husband his administrator, under the order of the probate court, sold the equity of redemption to Wheelock, who conveyed it to Bumstead. The latter paid off the mortgage and it was discharged of record. The widow thereupon demanded her dower, but the court held she was barred. This case, which is very like the one at bar, was cited in *Van Dyne v. Thayer*, 19 Wend. 171, with apparent approval. Judge Cowen reviews many of the cases and holds that *Collins v. Torrey*, 7 Johns. 278, and *Coates v. Cheever*, 1 Cow. 475, were

decided without full consideration. Near the close of his opinion he says: "My deduction from this and other cases, I state in the words of Chancellor Kent (4 Comm. 45, 3d ed.), the wife's dower in the equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee or conveyed." I am not aware that the authority of that case has been overthrown.

The cases cited in behalf of the widow confirm rather than question the views we have expressed. In *Bartlett v. Musliner*, 28 Hun, 235, the purchaser had assumed and agreed to pay the mortgage debt as a condition of his purchase, and, having come under that obligation, might be deemed to have paid in behalf of the husband or his estate. The distinction is referred to in *Jones on Mortgages*, vol. 1, § 866, where it is said that, if the mortgage "be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge according to the value of her interest." In *Runyan v. Stewart*, 12 Barb. 537, the action was at law, and, while a majority of the court sustained the claim of dower, it was explicitly said that the result would be different in equity. In that case Runyan and his wife gave a mortgage, and thereafter the husband gave a conveyance to Baker, who assumed the payment of the mortgage. The court question the case of *Popkin v. Bumstead* (*supra*), but add that, in equity, Baker might be subrogated and have a decree for contribution. No reference was made to the assumption of the mortgage by Baker. In *Jackson v. Dewitt*, 6 Cow. 316, there was a release to the mortgagee and dower was denied. In *Wedge v. Moore*, 6 Cush. 8, the whole argument is founded upon an assumption of the mortgage debt by the purchaser, which is argued out from the facts. In *Platt v. Brick*, 35 Hun, 127, the action was by the purchaser of the equity of redemption, who was not bound to pay the mortgage debt, to compel the mortgagee to assign his mortgage for the protection of the purchaser's title against dower, its amount having been tendered. The court held that the assignment could be compelled; that there was a right of subrogation; that the assignment would not work a merger, and the mortgage could be interposed against the claim of dower. Of course, the technical or formal assignment is material only as showing a transfer rather than a payment, and where no payment was intended or made, but the mortgage debt subsisted in the new mortgage given, the result must be the same.

On the whole, I am satisfied that where the purchaser of the equity of redemption is not bound to pay the mortgage debt, but does, in fact, pay it in aid of his own title and estate, whereby it is

discharged, the claim of dower is subject to a just contribution. And the case is stronger where, as here, the technical payment consists in the substitution of a new mortgage intended to operate as and take the place of so much of the old one. The debt to which the dower was subordinated is changed in form, but, in fact, remains, and the discharged security may be revived when equity so requires (*Gans v. Thieme*, 93 N. Y. 225).

The judgment of the General Term and of the Special Term should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

NEW YORK REAL PROP. LAW, § 172. Where a person seized of an estate of inheritance in lands executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.¹

§ 173. Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.²

§ 175. A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.³

¹ Similar provisions are contained in the statute law of other States. Maine, Rev. Stat. (1883), c. 103, § 12; Mass. Pub. Stat. (1882), c. 124, § 5; Verm. Stat. (1894), § 2529; Ill. Ann. Stat. (1896), c. 41, § 3; Mich. Stat. (1882), § 5735; Wis. Ann. Stat. (1889), § 2162. And see Ind. Ann. Stat. (1894), § 2652.

² Ind. Ann. Stat. (1894), § 2656; Ill. Ann. Stat. (1896), c. 41, § 4; Mich. Stat. (1882), § 5736; Wis. Ann. Stat. (1889), § 2163, *accord*.

³ Ill. Ann. Stat. (1896), c. 41, § 6.

CHAPTER I. (*Continued*).

SECTION IV. FIXTURES.

WALMSLEY v. MILNE.

COURT OF COMMON PLEAS, 1859.

(7 C. B. [N. S.] 115.)

CROWDER, J., now delivered the judgment of the court:

This was an action by the assignees of a bankrupt, to recover from the defendant certain articles alleged to be part of the bankrupt's estate. It was tried before my Brother Byles at the last Spring Assizes at Liverpool, when a verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

The facts were these: Moore, the bankrupt, being the owner of a vacant plot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in this action. They consisted of a steam-engine and boiler used for the purpose of supplying with sea-water the baths which had been erected on the premises; also a hay-cutter and malt-mill or corn-crusher, and grinding-stones, all (except the grinding-stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to the things themselves. The upper mill-stone lay in the usual way upon the lower grinding-stone. All these fixtures were put up for the purposes of trade.

The rule was argued before my Brother Willes and Byles and myself; and in the course of the argument a great many cases were cited, which we desired time to consider before delivering our judgment.

On the part of the plaintiffs it was contended, first, that the articles in question were not fixtures at all, because not permanently attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the bankrupt;¹ or, secondly, that, if

¹ This portion of the opinion is omitted.

fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees.

But, secondly, it was contended on the part of the plaintiffs that, assuming the articles in question to have been so affixed as not to be removable according to the general rule of law, yet that, as they were trade fixtures, they might be removed, and so would pass to the bankrupt's assignees.

The whole of the plaintiffs' argument upon this head was founded upon the well-established exception to the general rule, that, where a tenant puts up fixtures for the purpose of trade during his term, he may before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiffs, that, if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration, the fixtures in question were such as would have passed to the assignees. But they denied that any such tenancy existed in the present case. And this leads us to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee, which it is really difficult to express in any other legal terms. A mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or *like* a tenant at will: but he has never been designated as tenant for any term. Lord Ellenborough, in *Thunder d. Weaver v. Belcher*, 3 East, 449, called him a tenant at sufferance; and Lord Tenterden, in *Doe d. Robey v. Maisey*, 8 B. & C. 767 (E. C. L. R. vol. 15), 3 M. & R. 107, said—"The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee." He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing crops.

All the cases, therefore, which show that, where a tenant for years has put up trade-fixtures, he may remove them before his tenancy expires, have no application to the case at Bar. But two cases of mortgagee and mortgagor in possession were cited by the plaintiffs' counsel as strongly supporting their clients' title to the verdict. One was *Trappes v. Harter*, 2 C. & M. 177, decided by the Court of Exchequer, in which Lord Lyndhurst delivered the judgment of the Court; and the other was *Waterfall v. Penningstone*, 6 Ellis & B. 876 (E. C. L. R. vol. 88), in which our present Chief Justice, then Mr. Justice Erle, delivered the judgment of the Court of Queen's Bench.

Trappes v. Harter was a decision in favour of the assignees of

a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to pass them. The mortgage enumerated various fixtures, but did not refer to the fixtures in dispute; and this omission, together with other circumstances in the case, induced the court to be of opinion that they were intentionally omitted in the mortgage deed, and therefore did not pass by it. That case, then, "must be regarded as having been decided on its own peculiar circumstances," as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us. The other case, of *Waterfall v. Pennington*, was also that of a bankrupt mortgagor in possession and a mortgagee, where the question was, whether the bill of sale of the fixed machinery, drawn in the shape of a mortgage, required registration under the 17 & 18 Viet. c. 36. This partly involved the consideration as to whether the fixtures were to be deemed goods and chattels within that act, and *Hellawell v. Eastwood*¹ was cited in the argument, and recognised as a valid authority by the court. But the species of mortgage was of a peculiar description. There had been a prior mortgage of the premises with the fixtures then thereon. Afterwards, for a further consideration, a mortgage was made of the fixtures which had been subsequently annexed, by themselves, and the court was of opinion that they did not pass by the prior mortgage "because the tenor of the instrument shows that the parties did not so intend;" and they held that the separate mortgage of these fixtures was within the 17 & 18 Viet. c. 36, requiring the deed to be registered; and, for want of such registration, they decided that the fixtures passed to the assignees. In the present case, however, there do not appear any circumstances tending to show an intention existing between Moore, the bankrupt, and his mortgagee, that the fixtures annexed subsequently to the date of the mortgage should not become part of the mortgaged estate; and, in the absence of such intention, the current of authorities in the bankruptcy court shows that such an annexation of fixtures would enure to the benefit of the mortgagee.

In *Ex parte Belcher*, 4 Deac. & Ch. 703, which was decided in the Court of Review in 1835, it was held that fixtures annexed to the freehold after the mortgage by the mortgagor in possession, and which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The Chief Judge (afterwards Mr. Justice Erskine) there says, after adverting to the relaxation of the general rule of law in favour of trade fixtures put up by the tenant, "But that is not the present case. Again, it is said that the property in question did not pass by the mortgage

¹ 6 Exch. 295.

deed. Now, it always appeared to me that, where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term, and part of the freehold; and, if the inheritance be afterwards sold or let, it goes with the freehold; and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon." And, in another part of his judgment, he says: "Again, it is urged that, as to those articles which were attached after the execution of the mortgage deed, they could not pass to the mortgagee. But there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that, where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between those which were affixed before and those affixed after the date of the mortgage deed. In that point of view also, I am of opinion that all the fixtures alike passed to the mortgagee." There is also a very elaborate and learned judgment of Mr. Commissioner Holroyd, reported in 2 Mont., D. & De G. 443 (1841), in which the whole subject is fully considered, and a similar opinion very clearly expressed. To the same purport are the decisions in the Court of Review, *Ex parte Broadwood*, 1 Mont., D. & De G. 631 (1841); *Ex parte Price*, 2 Mont., D. & De G. 518 (1842); *Ex parte Bentley*, 2 Mont., D. & De G. 591 (1842); *Ex parte Cotton*, 2 Mont., D. & De G. 725 (1842), and *Ex parte Tagart*, 1 De Gex, 531 (1847). . . .

We think, therefore, that, when the mortgagor (who was the real owner of the inheritance) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action.

The verdict, therefore, must be entered for the defendant.

*Rule absolute.*¹

¹ *Winslow v. Merchants' Insurance Co.*, 4 Met. (Mass.) 306 (1842); *Roberts v. Dauphin Bank*, 19 Pa. St. 71 (1852); *Foote v. Gooch*, 96 N. C. 265 (1887); *McFadden v. Allen*, 134 N. Y. 489 (1892), *accord*. So are the cases generally. But see *Clore v. Lambert*, 78 Ky. 224 (1879), *contra*.

CLARY v. OWEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869.

(15 Gray, 522.)

Action of tort by the assignee in insolvency of Heman D. Burghardt, for the conversion of four water-wheels, with the shafts, couplings and other machinery connected with them. At the trial in the superior court the plaintiff introduced evidence of the following facts:

In 1854 Burghardt contracted with John E. Potter, who then owned certain real estate in Barrington, to furnish the water-wheels and machinery, and to set them up in wheel-pits to be prepared by Potter on the premises, for the sum of \$3,500, of which \$500 was paid at once, and the balance was to be paid on the completion of the work, in notes secured by a mortgage of the property, or by a mechanic's lien. In the latter part of 1854, Burghardt, in pursuance of this contract, constructed the wheels in question, which were made of cast-iron and placed in pairs upon cast-iron shafts, and set them up in penstocks and a flume, the frame of which rested on a stone foundation built by Potter in all respects like the foundation of a building. The wheels were intended for the purpose of driving a paper-mill on the premises; they were outside of the paper-mill building, but the mill could not be used without them.

In January, 1855, before the completion of the wheels and fixtures, the mill was destroyed by fire; Potter failed and abandoned the work; and Burghardt never fulfilled his contract and never received any payment or security, except the \$500 paid at the time of making the contract; never delivered the wheels, except in so far as setting them up as above described amounted to a delivery; never offered to return the money which he had received, and never called on Potter for any payment. When the contract was made the premises were subject to certain mortgages, which were afterwards assigned to the defendants, who had previously had notice that Burghardt claimed to own the wheels and machinery, and who, a year after the fire, took possession of the premises, which were in the condition in which the fire had left them, to foreclose the mortgages, and afterwards purchased the equity of redemption.

Upon this evidence Putnam, J., ruled that, the wheels having been placed on the premises after the execution of the mortgages, the action could not be maintained. The plaintiff then offered to show that, by the agreement between Burghardt and Potter, the wheels were to remain the property of the former until completed and payment for them secured by mortgage: but the judge ruled

that, even if that were proved, the plaintiff could not maintain his action, and directed a verdict for the defendants, which was returned, and the plaintiff alleged exceptions.

HOAR, J. It is conceded in the argument of the plaintiff's counsel, that the mill-wheels, for the value of which this action was brought, must be considered, as between mortgagor and mortgagee, fixtures belonging to the realty. They were essential to the operation of the mill, and were intended, when completed and paid for, to be permanently attached to the land. If the mortgagor had himself annexed them to the freehold, there could be no doubt that the mortgagee would hold them under his mortgage, and that they could not be severed without his consent (*Winslow v. Merchants' Ins. Co.*, 4 Met. 306). But it is contended that the mortgagor being in possession, and having agreed with Burghardt that the wheels should remain the personal property of the builder until they were completed and provision made for paying for them, the wheels, having been set up under this agreement, could not be claimed and held by the mortgagee.

If this position were tenable, it would follow that the mortgagor could convey to another a right in the mortgaged premises greater than he could exercise himself. But it is well settled that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount. The mortgagor cannot make a lease which will be valid against the mortgagee; and if the mortgagee enter, neither the mortgagor nor his lessee will be entitled to emblements (*Pow. Mortg.*, c. 7; *Keech v. Hall*, 1 Doug. 21; *Lane v. King*, 8 Wend. 584; *Mayo v. Fletcher*, 14 Pick. 525). And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises, with all the additions and improvements made by the mortgagor or by his authority.

Whether a person putting a building upon land by license of the mortgagor, under such circumstances that it would remain his personal property as against the mortgagor, would be allowed in equity to maintain a bill to redeem, if the mortgagee should enter, is a question involving very different considerations. A tenant under a lease may redeem, to protect his interest (*Rev. Sts.*, c. 107, § 13; *Bacon v. Bowdoin*, 22 Pick. 401).

It has been suggested that the defendants cannot avail themselves of their title as mortgagees, because they acquired the title of the

mortgagor also, and therefore the mortgages are to be regarded as paid or merged. But it has been often decided that the purchaser of an equity of redemption may take an assignment of the mortgage, and may keep the legal and equitable titles distinct, at his election, if he has any interest in so doing, so that they shall not merge by unity of possession. And a release of an equity of redemption operates as an extinguishment of the equity of redemption, and not as a merger of the estate conveyed by the mortgage (*Loud v. Lane*, 8 Met. 517).

*Exceptions overruled.*¹

CRIPPEN v. MORRISON.

SUPREME COURT OF MICHIGAN, 1864.

(13 Mich. 23.)

Error to Branch Circuit.

Trover for steam engine, etc. The case was tried by the Court, who found the facts, and rendered judgment upon the finding for the plaintiffs. The facts are sufficiently stated in the opinion of the Court.

CAMPBELL, J. Defendants in error brought an action of trover for the conversion of a steam engine and its appurtenances, which they claimed under the following circumstances: Francis A. Hall mortgaged certain lands in Batavia, Branch County, amounting to 572 acres, to one Hiscock, October 22, 1856, for \$4,000; and this money was borrowed under a verbal agreement that Hall should erect a saw-mill on the premises. On the same day, Hall contracted with defendants in error to build and put up the engine in question, he agreeing to put up a suitable mill-frame and engine-house to receive it, and upon its acceptance to execute back a chattel mortgage on the engine, and a mortgage upon the land, which was already subject to the Hiscock mortgage. It was expressly agreed that the engine and appurtenances should continue to be the property of defendants in error, until they should receive the mortgage securities on the chattels and on the real estate. On April 15, 1857, these securities were delivered, the machinery having been accepted. They were properly filed and recorded, and kept alive till suit. October 10, 1857, Hiscock came

¹ *Maugher v. Hayes*, 152 Mass. 228 (1890); *Bass Foundry Works v. Gith-leitine*, 99 Ind. 525 (1884); *Cunningham v. Curleton*, 96 Ga. 489 (1895), *accord*.

menced a foreclosure suit, making defendants in error parties with the other persons interested in the land. A decree was obtained December 31, 1858, for the amount of \$820, then due; and June 25, 1860, a further decree was obtained for installments subsequent to the first decree. Before the first decree, and in October, 1857, about two weeks after the foreclosure suit was commenced, Hiscock assigned \$3,860.44 of the mortgage money to one William P. Morley, who was not a party to the bill. August 24, 1858, and before any decree, Morley assigned to Crippen (the defendant below, and plaintiff in error), informing Crippen that he had no interest in the machinery. December 31, 1859, Hiscock assigned the remaining interest in the mortgage to Crippen. Prior to July 26, 1858, and before Crippen obtained any interest in the mortgage, the machinery was taken down and stored in the mill building. One Laman then became owner of the property and machinery mortgaged, and, in Crippen's presence, promised to pay the Hiscock mortgage and the claim of defendants in error. Laman subsequently put up the machinery again in the mill. October 4, 1860, Crippen bid in the lands on the foreclosure sale, and the sale was confirmed October 30th. He took possession of everything, and subsequently took down the machinery, using a part in another mill, and storing the rest. In November, 1860, a demand was made for the machinery by defendants in error, at the mill. In February, 1861, a further demand was made at Crippen's barn, where some of the property was then stored. He made no reply whatever to either demand. The Circuit Court gave judgment against Crippen for a conversion.

The rules which apply to personal property after it has been put to any use in connection with land are not uniformly agreed on, and any attempt to harmonize all the authorities would be idle. We must, in all these cases, adopt such conclusions as appear most in accordance with the general doctrines of the law.

At the common law, personal property, as a general rule, never lost its identity in realty, unless so closely incorporated with it that it could not be separated without injury to the freehold. And even under the peculiar preference given by the English law to trade over agricultural improvements, buildings erected for farming uses, although resting upon foundations of masonry, were not considered as real estate as against the tenant, if capable of being removed without injury. In *Wansbrough v. Maton*, 4 Ad. & El. 884, it was held expressly that a barn resting upon a masonry foundation and capable of removal, was no part of the freehold, and was therefore, in all respects, the chattel of the tenant who built it. This case is based upon a former decision in *Rex v. Otley*, 1 B. & Ad. 161, where the question did not arise between landlord and tenant, but was decided upon the nature of the property itself. There a person

owning land upon which was a windmill, consisting of a wooden mill and its machinery, resting upon, but not fastened to, a brick foundation, leased the land and the mill to a tenant. The rental value of the whole property was thirty pounds, of which more than twenty pounds represented the rent of the mill. It was held that the mill was no part of the realty, and that the tenant could not be regarded, therefore, as holding a tenement of the value of ten pounds.

In regard to erections made by tenants for purposes of trade or manufacture, an exception was early raised in their favor, allowing them to remove erections made for those purposes, although actually annexed to the freehold in a substantial way. But inasmuch as these erections had, during the tenancy, become actual parts of the freehold, it was usually necessary for the tenant to remove them before restoring the possession to the landlord, as he could not afterwards enter upon and remove that which had become part of the land; although, during his possession, he was not liable for such waste as would arise by such removal of what he had himself erected. If, however, the estate of the tenant was indeterminate, the property in the improvements was not divested by the lapse of the tenancy, and they might be removed afterwards (*Bennett v. Nichols*, 12 Mich. R. 22; *Ombony v. Jones*, 19 N. Y. 234; Taylor, Landl. and Ten., § 552; *Van Ness v. Pacard*, 2 Pet. 137; *Penton v. Robart*, 2 East R. 88). And in *Holmes v. Tremper*, 20 J. R. 29, it was held that if a tenant, after his term expired, entered upon the land and removed a cider mill, although he was liable in trespass for the entry, he was not liable in replevin for the property, because the property was not relinquished by his giving up possession of the land, unless such was his design. A similar rule was laid down in *Lawrence v. Kemp*, 1 Duer R. 363.

There can be no dispute but that, in this country and in England, many cases have been decided (and we are not disposed to question their propriety) which hold that personal chattels, although severable without material injury to the freehold, may yet pass as realty if apparently suitable and actually designed to be permanently attached to the land. These cases are many of them founded upon the change of business, whereby motive power, which formerly depended on the freehold itself by the improvement of water privileges, has now become dependent on steam engines, which are personal chattels. The doctrine that held all the machinery of a water-mill to be fixtures was based upon the idea that it was all designed to obtain the beneficial use of the realty. This principle cannot strictly apply to steam machinery, where everything is really dependent on that which is in its nature personal; and it is not surprising that in seeking to apply old rules to new circum-

stances, courts should not have always been consistent. Mills and factories are generally set up as entireties for the purpose of grinding, sawing and manufacturing; and yet, according to the current of modern decisions, the ultimate purpose is disregarded; and while the steam engine, which is but an incident to the main purpose, and which is often removed and replaced without disturbing the rest, is presumed to be realty, the looms and other permanent machinery, for the accommodation of which the building was chiefly erected, are at the same time regarded as mere chattels. Such an arbitrary rule is unreasonable, and contrary to the general usage of business, and, if allowed to prevail over the actual agreements of parties, would work great injustice.

But we think that, with very few exceptions, the authorities agree that there is no inflexible rule on the subject, and that every presumption which might arise in the absence of an agreement may be defeated by the agreement. In *Wood v. Hewett*, 8 Q. B. 913, the whole doctrine is put upon an intelligible and sensible basis. In that case, a fender, or water-gate, was built in masonry upon the lands of a party, who removed it, and who was sued in trespass by the proprietor of a mill upon other lands, on the ground that it was his property. The defendant claimed that it was a part of his freehold. Lord Denman said: "The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity where the chattel is separable." . . . "The decision in *Mant v. Collins* is so far an authority in point of law as it shows that, in a case of this kind, it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use; and the respective rights may be determined by the evidence on these points." . . . "The argument from the nature of the thing decides nothing." Patteson, J., said: "The question does not turn upon any general doctrine of law, but upon the evidence in the case. The general rule respecting annexations to the freehold is always open to variation by agreement of parties; and if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appear to have been so agreed." The case of *Mant v. Collins* decided that a pew door was not of necessity a part of the inheritance. In *Waterfall v. Penistone*, 37 Eng. L. & Eq. 156, where the owner of a mill mortgaged the mill, and some years afterwards made a second mortgage of the mill and other machinery since put up in it to the same person, and subsequently made a transfer of machinery to another person, and became bankrupt, it

was held the machinery did not pass by the real estate mortgages, and, the bill of sale being ineffectual for non-compliance with statute regulations, the assignees in bankruptcy took the property as undisposed of. It was machinery put up for trade purposes by the landowner, and such as would have been presumed fixtures had not the party shown a different intent.

In *Mott v. Palmer*, 1 N. Y. Rep. 564, it was held that rails built into a fence, with the understanding that they might be removed, did not pass to the vendee, although purchasing and taking possession without notice. And many cases are cited to show that ownership of the soil by one is not incompatible with ownership of any erection upon it by another. In this case, also, the owner of the rails was allowed to recover against the purchaser of the land for converting them the year after he purchased. There seems to be no limitation concerning the kind of severable chattel which may be owned by one person upon another's land. See *Dame v. Dame*, 38 N. H. 429; *Lancaster v. Eve*, 5 C. B. (N. S.) 717; *Duck v. Braddyll*, 13 Price, 455; *Trappes v. Harter*, 2 C. & M. 153; *Rogers v. Woodbury*, 15 Pick. R. 156; *Smith v. Benson*, 1 Hill R. 176; *Russell v. Richards*, 1 Fairf. 431; *Van Ness v. Pacard*, 2 Pet. 137.

The case of *Ford v. Cobb*, 20 N. Y. 344, in some of its principal features, resembles the case now before us. Salt kettles and grates and arch fronts were purchased to be set up in brick arches, and a chattel mortgage was given back reciting these facts, and was duly recorded. The land was then sold to a purchaser without notice. It was held that the kettles never became realty, and that the chattel mortgage title must prevail. The case of *Godard v. Gould*, 14 Barb. S. C. R. 662, was entirely similar in principle.

There are cases in some States, particularly in Massachusetts, which are not consistent with these decisions. But when we consider the original common law doctrine, requiring an actual incorporation into the freehold, and the peculiar rules of policy which have since allowed articles which are personal in their nature to be annexed by construction, we think that rule is the safest which allows personalty to continue as such until changed by design into realty.

So long as a chattel may be removed as such from real estate, and is in a condition to be removed without material injury to the freehold, it is difficult to see by what process the title to it can be divested from its original owner without some sale or transfer, or some acquiescence in the sale or transfer made by another, under circumstances going to create an estoppel. The cases in New York hold distinctly that the chattel does not cease to be a chattel, and does not therefore pass to a *bona fide* purchaser of the land. This is in accordance with the usual rule concerning separate chattels,

a *bona fide* purchaser having no claim against the true owner. Whether this rule should be universal is not material in the case before us, for there has been no *bona fide* purchase, and therefore it is not necessary to express an opinion on it. The machinery was not put up when the original mortgage was given, and Crippen, when he first obtained his assignment from Morley, was informed there was no claim on the machinery. He could not divest himself of the force of this notice.

It is claimed, however, that, by the rules of law, fixtures made after a mortgage belong to the mortgagee, and that the mortgagor has not such an estate as will authorize any one to make an agreement with him touching the use of the land. Under the English rule, which gives the mortgagee an immediate right of possession, the mortgagor cannot give others a right he does not possess himself; and should he erect improvements which could not be severed without injury, they must undoubtedly continue on the premises. Improvements made by him would be presumed to be made for the benefit of the inheritance. But we think those cases which make this presumption absolute, not only as against him, but as against other owners of chattels placing them on the premises, go beyond reason, and divest property without any necessity or propriety, when its nature has not, in fact, been changed (*Waterfall v. Penistone, supra*).

Neither do we consider the position of a mortgagor the same now as it was before the statutes forbidding possessory actions against him. Cases have been cited to us which hold that this statute only takes away a remedy, but leaves the right of possession unimpaired in the mortgagee. With great respect for the tribunals so deciding, we cannot accept this interpretation. It destroys all the value of the provision, if it allows a right of entry against the will of the mortgagor. In *Mundy v. Munroe*, 1 Mich. R. 68, it was held the statute was void as to former mortgagees; a ruling which would have been out of place, had the law not reached something more than a mere remedy. This decision has been affirmed on numerous occasions since. In *Baker v. Pierson*, 5 Mich. R. 456, it was held by this court that a prior mortgagee, who, during a foreclosure suit of a subsequent mortgage, obtained possession from the mortgagor, could not retain possession after a sale on that foreclosure. To this opinion we adhere, as in accordance with the statute. The mortgagor, therefore, until actual foreclosure, is in possession by right, and not by sufferance, and may make such arrangements for the use of the property as any other person could during his term. The machinery never became any part of the realty: Crippen was not misled by appearances, and had no right to dispose of it.

It is also objected that defendants in error are barred of their

claims because they were parties to the foreclosure suit. But as they had mortgages on the real estate, they were proper defendants on that ground. We cannot presume the bill in that case was filed for any other purpose than a simple foreclosure. The ordinary allegations of a foreclosure suit would not authorize a decree declaring these chattels to belong to the realty. The decree, under ordinary circumstances, would simply allow the land to be sold, leaving all questions concerning its appurtenances to be disposed of as they should arise. To determine them in advance would require special averments in the bill (*Wurcherer v. Hewitt*, 10 Mich. R. 453).

Judgment should be affirmed, with costs.

MARTIN, Ch. J. Whatever may be the rule of the common law respecting fixtures, in the absence of any agreement of parties, it is well settled at this day that the contract of parties will fix the character, and control the disposition of personal property, which, in the absence of a contract, would be held to be a fixture; in other words, the parties interested may control the legal effect of any transaction respecting such property by express agreement. Such was done in the case before us. The property which is the subject of this litigation was only erected upon the premises upon the agreement that it should be subject to a chattel mortgage for its purchase price. By this the parties kept it separate from the realty, and it never became part of it. Such mortgage was given, and kept good up to the bringing of this suit, and all the evidence shows that all the parties through whose hands the property has been transmitted knew of such original agreement, and of the existence of such mortgage; and, as I think, it shows further that the land was purchased by all with this property excluded. Crippen certainly never purchased it, for he bought with full knowledge of the property, and the claims of the defendants in error to it. His ownership of the decree does not aid him, for he bought the decree with such knowledge, and could not hold it, or claim under it with any rights superior to those from whom he purchased. His purchase at the sale barely confirmed his title to the land, as he acquired it by purchase of the decree—nothing more.

*The judgment of the court below is affirmed, with costs.*¹

CHRISTIANCY, J., did not sit in this case.

¹ But compare *Coleman v. Stearns Mfg. Co.*, 38 Mich. 30 (1878).

BRENNAN v. WHITAKER.

SUPREME COURT OF OHIO, 1864.

(15 *Oh. St.* 446.)

Error to the district court of Lucas County.

The original action was prosecuted by the Brennans, plaintiffs, in the Court of Common Pleas of Lucas County, to recover from Whitaker and Phillips, defendants, damages for the alleged wrongful conversion by the defendants of two steam engine boilers, one large steam engine, a quantity of mill shafting, one drum, one balance wheel, the gearing for an upright saw, one muley saw and the gearing, and one poney engine.

The facts, as they appear in the record, are substantially as follows:

On the 9th of July, 1857, Farley & Ketcham, parties of the first part, executed a mortgage to the plaintiffs, parties of the second part, by which "the said parties of the first part, for and in consideration of the sum of \$1231.51, to them in hand paid by the said parties of the second part . . . do grant, bargain and sell unto the said parties of the second part, all and singular the goods and chattels hereinafter described, that is to say: The steam engine boilers now in the possession of said parties of the first part, designed to be used in their saw-mill in Oregon township, Lucas County, Ohio, being the same purchased by them of the said J. & J. Brennan this day, together with the engines and machinery attached to said boilers. To have and to hold all and singular the said goods and chattels hereinbefore bargained and sold, or mentioned, or intended so to be, unto the said parties of the second part forever; said goods and chattels now remaining and continuing in the possession of the said parties of the first part, in said Lucas County, Ohio."

The mortgage was given to secure the payment of the note of Farley & Ketcham to the plaintiffs, bearing the date of the mortgage, for the sum of \$1231.51, payable, with the interest, in one year, it being the amount due for the purchase money of the boilers mortgaged, and was subject to the condition that if default was made in the payment of the note according to its tenor, the plaintiffs might "enter upon the premises of the said parties of the first part at any place or places where the said goods and chattels or any part thereof may be, and take possession thereof, whether the same shall have been attached to the freehold, and in law become

a part of the realty or not, and to remove the same to any place or places they may deem best, and to sell and dispose of the same."

The mortgage was filed in the office of the recorder of Lucas County, on the 9th of July, 1857, and copies, with the requisite statements, again filed by the plaintiffs in the same place each year thereafter up to the time of the commencement of this action.

After the execution of the mortgage, the boilers were put by Farley & Ketcham into a saw-mill, erected by them on land of which they were the owners in fee. They were placed in an engine house, built principally of brick, on one side of and attached to the main building of the mill. The roof of the mill extended over and formed the covering of the engine house. The boilers were placed—one end on a cast-iron frame, called the fire-front, which formed the front of the furnace, and stood upon brick, the other end on iron stands also resting on the brick. Under the boilers were built, to support them, piers of brick, and the whole was inclosed in brick arches nearly surrounding the boilers, one end of which came up to the fire-frame, and the other was built into the end brick wall of the building. Usually the boilers are attached to the fire-front and brick work by stay bolts, but the witnesses were not able to say whether that was done in this case. The boilers could not be removed without taking down the brick work around them and a part of the building to make room for them to be taken out. To take the boilers out through the mill would not require the walls of the building to be taken down, but they could be taken out by removing a part of the wood work in front, or by making a hole in the lean-to or engine house, at the rear end of the boilers.

The engines were placed on wooden foundations and fastened to them with bolts. The large engine was in the brick building with the boilers, the other inside the main building. They were connected with the boilers by steam pipes. The main shaft was connected with the large engine by a connecting rod fastened with keys. The drum and balance wheel were placed on the main shaft and run with it. The gearing for the upright saw was connected by a belt running on the drum. The other saw connected directly with the shaft without any belt. The engines could be taken out; but there was no opening large enough to take out the fly wheel; and perhaps the drum would be too large for the doors.

The mill was completed in the fall of 1857, and was after that time occupied by Farley & Ketcham as a saw-mill, the motive power being furnished by the engine and boilers. The building was designed for a saw-mill, and in its form and structure was adapted to the business of such a mill; and, as appears from a description of the building contained in the record, it would, with-

out material alterations and additions, be comparatively of little value for any other purpose.

There was no water power connected with the mill, and it depended wholly on steam for its power.

On the 14th of January, 1859, Farley & Ketcham executed to the defendants a mortgage upon the real estate on which the mill was located and all its appurtenances, to secure an indebtedness owing by them to the defendants. The mortgage was duly recorded in the record of mortgages of Lucas County. This indebtedness was unpaid at the time of the commencement of this action, and the defendants were in the possession of the mill. The plaintiffs demanded possession of the property, but the defendants refused to permit them to take it away.

The plaintiffs claim that, at the time of receiving their mortgage, the defendants had notice of the mortgage to the plaintiffs. This is denied by the defendants. On the trial the Court of Common Pleas found this issue in favor of the defendants.

Upon this state of facts and finding, the Court of Common Pleas gave judgment for the defendants.

To reverse this judgment a petition in error was filed by the plaintiffs in the district court, where the judgment was affirmed, and the plaintiffs now seek in this proceeding to reverse this action of the district court.

WHITE, J. I. The plaintiffs seek to recover for a tort arising from the conversion of the property in controversy; and, in order to establish their title to such property, as against the defendants, Whitaker and Phillips, rely upon the chattel mortgage. In order to ascertain the relation in which Whitaker and Phillips stand to this mortgage, it is proper, in the first place, to determine whether they had notice of its existence at the time they received their real estate mortgage. The issue, upon this question of notice, has been twice found in favor of the defendants, by the Court of Common Pleas, and this finding we are now asked to review, on the ground that it is against the evidence. On this point, we only deem it necessary to state that the testimony in the court below was conflicting; and while, as original triers of fact, we would have been inclined to find differently, yet we cannot say that the finding is so manifestly wrong as to warrant this court in reversing the judgment on this ground.

II. The next question is whether, as between Farley & Ketcham, the mortgagors, and Whitaker and Phillips, the mortgagees, in the real estate mortgage, the property in controversy became a part of the freehold? We are of opinion that it did. A discussion of the general principles to be regarded in determining when additions of personal property become a part of the realty, is here

deemed unnecessary. The only difficulty arises in the application of these principles to the solution of particular controversies as they arise; and whether an article has been annexed to the realty so as to become a permanent accession to it, must, in a great degree, be determined by the circumstances of each particular case.

Farley & Ketcham, who made the annexations in the present case, were the owners of the fee; and the question we are now considering arises between them, as mortgagors, and their mortgagees, Whitaker and Phillips, who, for the purposes of their security, are to be regarded as purchasers.

The building was erected for a saw-mill, and in the form and nature of its structure was adapted to the business of a mill of that description. The boilers and engines were the only motive power, and were designed so to be when the mill was built. They performed the office of a wheel and water-power, and their adaptation to the structure and the uses for which it was designed, as well as the mode of their annexation, show that they were intended to be permanent. They could not be removed without leaving the saw-mill incomplete. The building itself for any other purpose would, without material alterations and additions, be comparatively of little value. The shafting, drum, balance wheel, gearing for the upright saw, and the muley saw and gearing, though differing from the boilers and engines in the mode of annexation, yet are to be regarded as fixtures.

The mode of annexation alone does not determine the character of the property annexed; but the appropriateness of the articles named to the mill, and their necessity to its completeness, are also to be looked to.

III. The remaining question is, whether the chattel mortgage to the plaintiffs, as against the real estate mortgagees, deprives the property in controversy of the character of fixtures? The plaintiffs claim that this is the effect of the chattel mortgage; and that they have the same right to recover the property from the mortgagees (Whitaker and Phillips), without notice, as they would have had against Farley & Ketcham, if the real estate mortgage had not been given.

It is not necessary to inquire what, as against mortgagees without notice, would have been the rights of a party, other than the owner of the freehold, who might have placed in the same manner upon the premises the property in question, under some agreement with the owner, for a temporary purpose, and with the right of removal, nor as to what would have been the effect if the property had been annexed by the tortious act of Farley & Ketcham. The facts in this case raise neither of these questions, and we forbear entering into an examination of the authorities cited bearing upon them.

Here it was not only the intention of Farley & Ketcham to annex the property to, and make it a part of, the freehold, but their so doing was according to the understanding of the parties when the mortgage to the plaintiffs was executed. In the mortgage it said the boilers are "designed to be used in their (F. & K.'s) saw-mill," and power is given the plaintiffs, on default of payment, "to take possession thereof (mortgaged property) whether the same shall be attached to the freehold and in law become a part of the realty or not." The right given to the plaintiffs by the mortgage to enter upon the premises and sever the property would, doubtless, have been effectual as between the parties. But the defendants were purchasers without notice of this agreement. The filing of chattel mortgages is made constructive notice only of incumbrances upon goods and chattels. The defendants purchased and took a conveyance of real estate of which the property now in question was, in law, a part; and, in our opinion, it devolved upon the plaintiffs who sought to change the legal character of the property and create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice. It is true that in the case of *Ford v. Cobb*, 20 N. Y. Rep. 344, it was held that an agreement which was evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land, without notice. But it seems to us to be the sounder rule, and more in accordance with principle, and the policy of our recording laws, to require actual severance, or notice of a binding agreement to sever, to deprive the purchaser of the right to fixtures or appurtenances to the freehold (*Fortman v. Goepper*, 14 Ohio St. Rep. 565; 2 Smith's L. C. 259; *Fryatt v. Sullivan Co.*, 5 Hill, 116; *Richardson v. Copeland*, 6 Gray, 536; *Frankland et al. v. Moulton et al.*, 5 Wisconsin Rep. 1).

In the case last named, the owner of a steam engine sold and assisted to annex the same to the realty, reserving a chattel mortgage on the same for a part of the purchase money; and it was held that the chattel mortgage was inoperative as against a prior mortgagee of the real estate. The mode of annexation was very similar to that existing in the case under consideration; and the holding that the chattel mortgage was inoperative as against a prior mortgagee of the real estate, as was likewise done in *Copeland v. Richardson*, *supra*, restricts the operation of agreements to sever what would otherwise be regarded as fixtures, more than is required to be done for the decision we make in the present case. Whether the restriction upon the right of removal that was applied in these

cases can be properly applied in favor of a mortgagee of the real estate claiming the property added to the premises after his mortgage as fixtures, and against a party claiming the same property as personal chattels under a chattel mortgage from the owner, when the removal would leave the realty claimed by the mortgagee as a security in as good plight as when his mortgage was taken, it is unnecessary now to inquire; and upon this question we express no opinion.

The judgment of the district court will be affirmed.

BRINKERHOFF, C. J., and SCOTT, DAY, and WELCH, JJ., concurred.

HUNT v. BAY STATE IRON CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

(97 *Mass.* 279.)

Bill in equity, filed in August, 1863, by one of the guarantors of a certain promissory note of the Boston and New York Central Railroad Company, to compel the execution by Horatio N. Slater, one of the respondents, of a trust concerning certain iron rails laid down and fastened upon the road-bed of that railroad company between Boston and Dedham, prior to January 1, 1855, and continuing so attached to the road-bed from that time to the time of bringing this bill; which trust was alleged to be raised by the following instrument executed by Slater on September 18, 1854:

"Whereas I have this day purchased of the Bay State Iron Company ten hundred and fifty-three tons of iron, paying therefor with the note of the Boston and New York Central Railroad Company [for sixty-eight thousand four hundred and fifty-five dollars], secured by thirty of their mortgage bonds, and also secured to the amount of forty thousand dollars of the personal guaranty of [here followed a list of the guarantors]; and whereas the said Boston and New York Central Railroad Company have promised to pay to me five thousand dollars per month after the 1st day of March, A.D. 1855, out of the receipts of their said railroad, which sum, if received by me, I intend to apply to their said note given to me and by me sold to the Bay State Iron Company, the said five thousand dollars to be applied in part to reducing the guaranty of the said above-named persons: Now, therefore, I hereby agree

¹ But see *Ford v. Cobb*, 20 N. Y. 344 (1859), and *Seward v. Lee*, 122 311, 487 (1887), *contra*.

with the said guarantors that I will hold the said iron to indemnify them for all their liability as such guarantors, it being understood, however, that in consideration of the pledge of their receipts to me, I may either or both loan or sell said iron to said company to be used by them upon their said road. In testimony whereof I have hereunto set my hand and seal this 18th day of September, A.D. 1854."

It was further alleged in the bill, and it appeared at the hearing, that on September 23, 1854, an agreement under seal was entered into between Slater and the railroad company, in pursuance of which the iron thus bought was leased to the company and laid down and fastened upon their road-bed, the material parts of which agreement were as follows:

"The said Slater agrees to lease and by these presents doth lease to the said company ten hundred and fifty-three tons of railroad iron, compound rail, to be laid down and used by said company on their railroad.

"The said company agree to pay to said Slater for the use of said iron five thousand dollars per month, the first payment to be made on the first day of March, A.D. 1855, and so on upon the first day of each succeeding month till they shall have paid to him sixty-eight thousand four hundred and fifty-five dollars and the interest on the same from the 16th day of September, A.D. 1854.

"If there shall be any default of said payments to said Slater the said company hereby authorize said Slater to take up and remove the said iron leased by him to them, though the same be put down and used upon their railroad.

"If there shall be no default of said payments the said Slater agrees, when the said sixty-eight thousand four hundred and fifty-five dollars and the said interest shall have been paid to him as aforesaid, that then he will sell and deliver to said company the said iron leased by him as aforesaid, giving them a receipt in full of all demands for the use of said iron and a release of all his interest in and to the same without further consideration."

And it was further alleged and was proved at the hearing that the railroad company failed to pay its note at maturity, March 1, 1856, and accordingly certain of the guarantors, including the complainant, were called upon to pay and did pay the amounts guaranteed by them severally thereon.

The prayer of the bill was for a decree to compel Slater to take possession of the iron and dispose of it and out of the proceeds reimburse to such guarantors the amounts of their several payments.

Among the parties cited as respondents, who appeared and contested the prayer of the bill, was the Southern Midland Railroad

Company (incorporated by St. 1861, c. 155, as the Midland Land Damage Company and changed in name by St. 1863, c. 116), which alleged title to the iron in dispute by virtue of a conveyance by the Boston and New York Central Railroad Company on November 1, 1858, of its "railroad and all its other property," specifying "the road-bed and all land taken or purchased by said grantor," and also "all rails, timber, iron," "fixtures and other equipment," "belonging to said grantor," to the Midland Railroad Company (incorporated by St. 1858, c. 60); and of a subsequent conveyance of the same by the Midland Railroad Company on June 14, 1862, to the Midland Land Damage Company; and which further contested the prayer of the bill, as being the assignee of unsettled claims for land damages, to an amount more than the value of the iron, of the owners of the land over which the railroad was located.

Another party, cited as respondents, who appeared and contested the complainant's prayer, was the trustees for the holders of bonds of the Boston and New York Central Railroad Company, under a mortgage deed (alleged in the bill to be invalid) given by that company to secure those bonds, and dated March 7, 1854, of its railroad and franchise, "including all the land and real estate used and intended to be used by said company for their said road, and all rights, easements, privileges and appurtenances," and also "all articles of personal property whatsoever now owned or used by said corporation or which they may hereafter own or use."

And the trustees for the holders of bonds of the Southern Midland Railroad Company, under a like mortgage deed given by that company, were also made a party to the bill.

The case was reserved for determination by the full court.

FOSTER, J. There can be no doubt that the rails when laid upon the road-bed and fastened there so that engines and cars could pass over them would have become annexed to the realty and ceased to be personal property in the absence of any agreement changing the ordinary rule of law.

It was held in *Pierce v. Emery*, 32 N. H. 484, and *Haven v. Emery*, 33 N. H. 66, that rails delivered under an agreement that they should be laid down on a specific part of the railroad and continue the property of the vendors until a specified price was paid for them remained the personal property of the vendors until payment, and were not when laid so inseparably annexed to and incorporated with the realty that they could not be removed for non-payment of the price. The agreement of the parties was held to supersede the general rule of law, and to be binding likewise upon subsequent mortgagees with notice. Notice to the trustees was held to be notice to the bondholders under such a mortgage. But without notice it was considered that the mortgagees would not

be affected by a private agreement changing the natural and legal character of the property from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances which by the general rules of law would result from such a purchase. We are satisfied with the principles and follow the authority of these cases (*Strickland v. Parker*, 54 Maine, 263).

Our own adjudged cases fully support the position that the rails when laid became a part of the realty in the absence of any agreement to the contrary (*Peirce v. Goddard*, 22 Pick. 559; *Winslow v. Merchants' Insurance Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Richardson v. Copeland*, 6 Gray, 536). They likewise recognize the doctrine that buildings and other erections or fixtures so attached to the realty as to become ordinarily a part thereof may, by agreement between the parties, remain personal property (*Curtis v. Riddle*, 7 Allen, 185). Both of these propositions seem to be everywhere accepted as sound law.

Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be and by its ordinary nature is a part of the realty (*Elwes v. Mawe*, 3 East, 38; 2 Smith Lead. Cas. 99, and notes). To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.

Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver. Landowners having a lien upon the location for their damages and a right to take possession for default of payment stand in the same position so long as their right remains to enforce payment by entering on the land.

Whether the mortgage of the railroad executed before these rails were laid, but then invalid, and afterwards confirmed by the legislature, should be treated as a security prior or subsequent to the laying of the rails, will probably not prove a material question in this case. By the agreement of the parties it must be sent to a master to ascertain all the facts as to notice; upon the coming in of his report we can more conveniently and intelligently determine

whether the agreement with Mr. Slater is still capable of being enforced.

It is valid between the parties, Slater and the original corporation, but binding upon prior mortgagees and the landowners (if they remain entitled to possession as security for their damages) so far only as they have consented that the rails shall remain personalty. It is binding upon such subsequent incumbrancers and grantees as had notice of it when they acquired title, but upon no others.¹

DAVENPORT v. SHANTS.

SUPREME COURT OF VERMONT, 1871.

(43 Vt. 546.)

Petition for foreclosure of a mortgage. The petition sets forth a mortgage, executed by John G. Shants & Co., to the petitioner, October 13, 1866, of a mill and factory and tannery in Searsburg, with 200 acres of land, and three dwelling-houses thereon. "And also the factory, then in process of erection on the site of said Searsburg tannery, with the saw-mill, water-wheels, and all the machinery and shafting in said factory," to secure a note of \$1000. The petition then sets forth the execution by Shants & Co., and the purchase by the petitioner, of another mortgage on the same premises, except the machinery, and also sets forth that the defendants, other than Shants & Co., claim an interest in said property.

The petition was taken as confessed by all the defendants, except Henry G. Root, who appeared and answered, admitting the facts set forth in the petition, or not denying them, except as follows:

That between the 3d day of August and the 27th day of October, 1866, this defendant, by his agent, Olin Scott, sold to the said John G. Shants & Co. various articles of machinery, consisting of a circular saw-mill and saw, and the belts to drive the same; the gears on two water-wheels; the upper piece of a large water-wheel shaft and box to the same; the counter-shafts to two water-wheels; the drum flanges and boxes to the said counter-shafts; and one extra saw collar; upon the condition that said machinery should be and remain the property of this defendant until the same should be paid for by said John G. Shants & Co.; the whole of said machinery amounting in value to the sum of of \$919.86, which they agreed to pay this defendant for the same. All of which

¹ *Porter v. Pittsburgh Steel Co.*, 122 U. S. 267 (1886), *acced.*

machinery, excepting the gears and upper shaft to the large water-wheel, and the counter-shaft and boxes to the same, were in place in the factory mentioned in said petition at the time of the alleged execution of the mortgages set forth in said petition, and the said excepted articles have since said time been placed in said factory. That there has been paid to this defendant towards the purchase of said machinery the sum of \$191 only, the remainder being still due with the interest thereon.

And this defendant claims and insists that his title to said machinery is paramount to that of the said John G. Shants & Co., and to that of the petitioner, and that the petitioner has no right to a foreclosure as to said machinery or any part thereof against the defendant.

The petitioner replied, saying that he never at any time, until long after the execution of the several mortgages sought to be foreclosed by this petition, had any knowledge or notice, actual or constructive, of any contract or understanding between the defendant and the said John G. Shants & Co., by which the defendant had or claimed to have any right or claim to the saw-mill, water-wheels, and the machinery and shafting in the factory described in said mortgage; that he did, on the 13th day of October, 1866, in good faith, and relying upon the fact that no claims, liens or incumbrances existed of record upon any of the property or estate described in said mortgage, and upon the promise and assurance of both the members of said firm of John G. Shants & Co. that none existed in fact, loan to said firm the full sum of one thousand dollars, and took said mortgage in good faith to secure the payment thereof; that if it is true that the defendant did reserve such a lien upon the several articles named in his answer to said petition for foreclosure, as is in said answer stated, yet it is also true that the defendant well knew the purpose for which John G. Shants & Co. purchased the same, and the defendant then and afterwards consented that they might attach and annex said water-wheels, saw-mill, shafting and machinery to their freehold, and make the same a part of and appurtenant to said freehold, and did by his agents and workmen assist the said John G. Shants & Co. in so doing; and insists that the lien created by his said mortgage is paramount to any lien or claim of the defendant to the saw-mill, water-wheels, machinery and shafting in said factory.

STIPULATION.—It is hereby stipulated that this cause shall stand for hearing upon petition, answer, replication, affidavits of Olin Scott and H. W. Scott, statement of facts, and notes and mortgages set forth in the petition. The facts stated in the answer are admitted to be true, excepting as varied or qualified by the replication in connection with the affidavits and statement of facts. The facts stated

in the replication are admitted to be true, excepting as varied or qualified by the affidavits and statement of facts, and excepting that the averment respecting annexing "to the freehold of the said John G. Shants & Co., and make the same a part of, and appurtenant to said freehold," is not to be taken as an averment of facts, but as a conclusion of law. The facts stated in the affidavits and statement are admitted to be true.¹

At the September term, 1868, decree, *pro forma*, foreclosing mortgage against all defendants, except Henry G. Root, and dismissing the petition as to Root, with costs. Appeal by petitioner.

H. H. Wheeler and *Charles N. Davenport*, for the petitioner, insisted that the machinery in question lost its identity as personal property, and would pass to any owner of the freehold who was not a wrongdoer, and cited Justinian 2, Tit. 1, § 30; Year Book, 5 Hen. VII. 15; Brooke's Abr., Tit. Prop., pl. 23; 2 Black. Com. 404; 2 Kent Com. 361; *Cross v. Marston*, 17 Vt. 533; *White v. Twitchell*, 25 Vt. 620; *Powers v. Dennison*, 30 Vt. 752; 1 Washburn, Real Prop., pp. 3, 542; 2 Kent, 261; 1 Leading Cases in Equity, 360-361; *Davis et al. v. Bradley et al.*, 24 Vt. 55; *Winslow v. Ins. Co.*, 4 Metcalf, 306; *Harris v. Haynes*, 34 Vt. 220; 2 Smith, L. C., 211-212 *et seq.*

The opinion of the court was delivered by

PECK, J. The bill having been taken as confessed as to all the defendants, except Henry G. Root, and he alone defending, the only question is as to the right of the orator, under his mortgage from Shants & Co., to that portion of the property sold conditionally by Root to the said mortgagors.

The bill, and answer of Root, in connection with the written stipulation of the parties on file, leave no dispute as to the material facts in the case, and no time need be spent in repeating the facts thus agreed.

It must be regarded as settled as a general rule in this State that a party may sell and deliver personal property under a condition that it shall remain the property of the vendor until the price is paid; and that under such contract the title will remain in the vendor until the condition is complied with, both as between the vendor and such conditional vendee, and also as between the original vendor and a *bona fide* purchaser without notice from such

¹ The affidavits and formal statement, dealing with the mode of annexation of the fixtures, are omitted. The statement concludes that "all the machinery mentioned above, including the water-wheels and appendages, were placed in the factory, which is a large two-story building, 33 x 99 feet, by John G. Shants & Co., for the purpose of prosecuting the business of manufacturing lumber, chair stock, etc., and is connected with and attached to the building, as machinery of that character usually is."

conditional vendee. The only question is whether the facts of this case take it out of the general rule.

The proposition of the counsel of the defendant Root is, that the whole property sold conditionally by Root to Shants & Co. was personal property as well after as before the sale, and cannot properly be claimed as fixtures or as parts of the realty. But we think as between mortgagor and mortgagee, if the title of the mortgagor were absolute, the defendant's proposition is not correct; and that under the recent decisions in this State, on being put in place in the mill and factory, as shown in this case, it became so far annexed to the realty as to pass under a mortgage of the real estate. But still the question remains as between the mortgagee under his mortgage, and the original owner under his conditional sale to the mortgagor, which has the paramount right.

First, as to that portion of the property which had been put in place in the mill and factory by the mortgagors after they thus purchased it of Root, and which was in the building and thus annexed at the time the orator took his mortgage: As to this property, the orator, as it appears, having advanced his money and taken his mortgage in good faith, without notice of any lien or incumbrance upon it, and from its condition having reason to suppose that the mortgagors' title to this property in question was the same as his title to the realty to which it was annexed, and of which it was apparently parcel, seems to have a strong equity in his favor. While, on the other hand, the defendant Root, the unpaid vendor, who endeavored to secure himself by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood when he sold the property to Shants & Co. that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property he must have expected that in its use it necessarily must be annexed to the realty substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property he must be taken to have consented to, as he did not object. Root, therefore, having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between him and an

innocent purchaser or mortgagee of real estate without notice who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property, except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.¹

TIFFT v. HORTON.

COURT OF APPEALS OF NEW YORK, 1873.

(53 N. Y. 377.)

Appeal from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of the plaintiffs, entered upon the verdict of a jury.

This action was brought to recover damages for the alleged conversion of a boiler and engine.

The plaintiffs, under a written contract, manufactured the engine and boiler in question, with other machinery, for Mrs. Jane Coombs Brown, to be put up and used in a new elevator

¹ *Buzzell v. Cummings*, 61 Vt. 213 (1888); *Haven v. Emery*, 33 N. H. 66 (1856); *Wickes v. Hill*, 115 Mich. 333 (1897), *accord.* And see *Kessel-son v. Johnson*, 37 Mich. 47 (1877), and *Lansing Iron Works v. Walker*, 91 Mich. 409 (1892).

which Mrs. Brown was building, in the city of Buffalo. By the terms of the contract, Mrs. Brown was to give for a portion of the purchase-price of the boiler, engine and other machinery her two promissory notes, to be secured by a mortgage on the boiler and engine. The notes and mortgages were to be executed and delivered so soon as the engine and boiler were complete in the plaintiffs' shop, ready to be put up at the elevator. The boiler and engine and other machinery were completed according to the contract; and while in the plaintiffs' shop the mortgage was given as provided in the contract. It was provided in the mortgage that the engine and boiler should be and remain personal property until the notes mentioned in it were fully paid, notwithstanding the manner in which they should be placed in the elevator. The mortgage recited the fact that the engine and boiler were made to be put up in the elevator of Mrs. Brown, pursuant to the agreement above mentioned, and authorized the plaintiffs, in case of a breach of its condition, to enter the elevator and take and carry the boiler and engine away. Mrs. Brown failed to pay the second note secured by the mortgage. The boiler and engine were not put in the elevator building, but on a foundation made for them outside of the building; and a building called the engine-house was built over them after they were set up. After the mortgagor failed to pay the note, plaintiffs went to take the boiler and engine, and, finding the defendants in possession, demanded them. The defendants claimed to own them, and refused to let the plaintiffs have them. The defendants claimed title to the engine and boiler through three real estate mortgages, executed by Mrs. Brown before the boiler and engine were set up on the premises. These mortgages had been foreclosed, and the premises sold under judgments obtained in the foreclosure actions, and the premises bid off by and conveyed to the defendants. The rights of the parties, by stipulation before sale, were not to be affected by the sales on the judgments in the foreclosure actions. The defendants asked the court to decide, as matter of law, that there was not any evidence of a conversion by the defendants of the boiler and engine. This the court declined to do. The defendants requested the court to decide that the boiler and engine were a part of the realty, as between the parties to this action, notwithstanding the written agreement. The court refused so to decide. The jury rendered a verdict in favor of the plaintiffs for the sum of \$5,141.88, and judgment was entered thereon.

M. A. Whitney and *R. W. Peckham, Jr.*, for the appellants. The engine and boiler became a part of the realty, and were subject to the liens of defendants' mortgages (*Potter v. Cromwell*, 40 N. Y. 287; *Voorhees v. McGinnis*, 48 *id.* 278; *Sparks v. State Bk.*

7 Black. [Ind.] 469; *Capen v. Peckham*, 35 Conn. 88; *Alford C. M. Co. v. Gleason*, 36 *id.* 86). The agreement in the chattel mortgage was of no avail, unless consented to by the mortgagee of the real estate (5 Am. L. Reg. [N. S.] 329, 330; *Leland v. Gassett*, Dig. [Vt. Rep.] 335; s. c., 17 Vt. 403; *Preston v. Briggs*, 16 *id.* 124; *Van Ness v. Pacard*, 2 Peters, 137; *Walmsley v. Milne*, 6 Jur. [N. S.] 125; s. c., 7 C. B. [N. S.] 115; Grady's Law of Fixtures, 153; 4 Mete. 310; *Butler v. Parker*, 7 *id.* 42; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Den. 174; *Gillett v. Balcom*, 6 Barb. 370). Under a mortgage on the land alone, all fixtures erected prior or subsequent to the mortgage are embraced (7 C. B. [N. S.] 135, and cases cited; 4 Deac. & Ch. 703; 4 E. D. S. 474; 2 Barn. & C. 96; 2 Adol. & El. 157; 19 Barb. 317; 6 *id.* 370; 15 Mass. 159; 7 Mete. 40; 8 Wend. 584; 2 Den. 174; 2 Sandf. Ch. 359).

John Ganson for the respondents. Plaintiffs had a right to fix the character of the property in the engine and boiler by the agreement in the chattel mortgage (*Ford v. Cobb*, 20 N. Y. 344, 349; *Potter v. Cornwell*, 40 *id.* 287, 294, 295; *Voorhees v. McGinnis*, 46 Barb. 242, 246; s. c., 48 N. Y. 278, 286).

FOLGER, J. It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as where the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached (*id.*).

It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement power was given to the plaintiffs to enter upon the premises in certain contingencies and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty and be permanently affixed to it, this was subordinate

to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid. And as parties may by their agreement, expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves the agreement in this case was fully sufficient to that end.

But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands; and that here the defendants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become subject to the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee; and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement upon the covenants in his conveyance of the lands (*Mott v. Palmer*, 1 N. Y. 564; and see *Ford v. Cobb*, *supra*).

A prior mortgagee who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage personal property brought on to the premises with permission of the owner of the lands and not at all affixed thereto. Nor can either claim personal property as so subject from the mere fact of the affixing, where by the express agreement of the owner of the fee and the owner of the chattel its character as personal property was not to be changed, but was to continue, and it to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained (*Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, *supra*; *Farrar v. Chauffetete*, 5 Den. 527; *Ford v. Cobb*, *supra*).

Another consideration makes it clear, I think, that in this case the absence of a concurrent intention on the part of the prior mortgagees is of no weight. As above stated, as a general rule, all fixtures put upon lands by the owner thereof become a part thereof and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels (*Winslow v. Mer. Ins. Co.*, 4 Metc. 306). The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest of a tenant in the land is temporary, that he affixes for himself with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold and in agreement with known usages. The law presumes that because the interest of the vendor of real estate who is the owner of it has been permanent, that he has made annexations for himself, to be sure, but with a view to a lasting enjoyment of his estate and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that improvements which he makes thereon by the annexation of chattels he makes for himself for prolonged enjoyment and to enhance permanently the value of his estate (*Winslow v. Mer. Ins. Co.*, *supra*). These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all with the relation to the lands, or with the purpose of the landlord or the vendee or the mortgagee; though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts (*Launcester v. Eve*, 5 C. B. [N. S.] 717). So in *Elliott v. Bishop*, 10 Exch. 426; S. C. in error, 11 Exch. 113, it is recognized that the express agreement of a tenant may prevent him from the exercise of his right to detach his annexations, which is the same as to say that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose which would otherwise arise is repelled. So in *Potter v. Cromwell*, 40 N. Y. 287, and cases cited, it is conceded that if the intention of the vendor of lands be to retain in chattels annexed thereto their character as personal property, such intention will prevail. So in *Voorhees v. McGinnis*,

supra, it is conceded that if the intention of the mortgagor of lands had been that chattels annexed were to be removable, the prior mortgagee could not have held them against the receiver of the goods, &c., of the mortgagor. See also *Crane v. Brigham*, 11 N. J. Eq. (3 Stockton), 29, 35; *Teaff v. Hewitt*, 1 Ohio St. (McCook), 511-531. The general rules governing the rights of parties in chattels thus annexed to the real estate rest, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different; not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence, I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees.

Though the defendants became the purchasers of the land on the foreclosure of the mortgages, and were the owners of it in fee, and probably in actual possession of it, and of the boilers and engines annexed to it, before this action was brought or demand made of them for these chattels, yet they are to be considered in this case only as prior mortgagees of it. Such is the effect of the stipulation made by them that the sale upon the decrees should not in any manner change the legal rights of the plaintiffs in this action; but for this it would have been necessary to have determined the effect upon the rights of the parties of the sale on foreclosure and the change of title and possession of the lands, and the application to that state of facts of the principle laid down in *Lane v. King*, 8 Wend. 584, and kindred cases.

It appears that the boilers and engine cannot be removed without some injury to the walls built up about them, and which are a part of the real estate; yet this fact will not debar the plaintiffs. The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building or other part of the real estate to which they were attached; nor will it destroy or of necessity injure the chattels themselves; nor will the injury to the walls about them be great in extent or amount. So that the limitation hereinbefore stated does not apply.

It is proper to add that the English case cited and much relied upon by the defendants has not been overlooked (*Walmsley v.*

Milne, 7 C. B. [N. S.] 115). I do not gather from it that the decision was placed upon the ground (as the defendants claim) that the mortgagee of the land did not expect or understand that the chattels annexed were removable or to be removed. The opinion of the court seems summed up in the concluding sentence: "We think, therefore, that when the mortgagor (who was the real owner of the inheritance) after the date of the mortgage annexed the fixtures in question for a permanent purpose and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been vested by the mortgage deed in the mortgagee." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this State. He is regarded as the owner and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. See case last cited, page 133; *Butler v. Page*, 7 Mete. 40.

The judgment should be affirmed, with costs to the respondents. All concur.

*Judgment affirmed.*¹

¹ *Duffus v. Howard Furnace Co.*, 8 App. D. (N. Y.) 567 (1896); *Eaves v. Estes*, 10 Kans. 314 (1872); *Cochran v. Flint*, 57 N. H. 514 (1877); *First National Bank v. Elmore*, 52 Iowa, 541 (1879); *Campbell v. Roddy*, 44 N. J. Eq. 244 (1888); *Brinkley v. Forkner*, 117 Ind. 176 (1888); *Warren v. Liddell*, 110 Ala. 232 (1895); *Willis v. Munger Machine Co.*, 13 Tex. Civ. App. 677 (1896), *accord*. And compare *McFadden v. Allen*, 134 N. Y. 489 (1892), and *Brannon v. Vaughan*, 66 Ark. 87 (1898).

CHAPTER I. (*Continued*).

SECTION V. WASTE AND REPAIR.

KING v. SMITH.

HIGH COURT OF CHANCERY, 1843.

(2 *Hare*, 239.)

W. Smith conveyed and surrendered certain freehold and copyhold estates to the use of J. Reid and his heirs, by way of mortgage, to secure £2700 and interest. W. Smith, by his will, gave all his real and personal estate to the defendant, S. Smith (who was also his heir-at-law, customary heir, and sole executor), "in hopes that he might be able to pay his (the testator's) just debts, and find a surplus for his trouble." J. Reid devised his legal interest in the mortgaged premises to the plaintiffs, and appointed them his executors. The plaintiffs, by their bill, charged that the mortgaged premises were a "scanty security" for the principal and interest due, and that the plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency, and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgage debt, a sale accordingly, and payment out of the proceeds; and if the same were insufficient, that the plaintiffs might be declared to be specialty creditors upon the estate for the deficiency; that, if necessary, the suit might be taken as being on behalf of the plaintiffs, and all other the unsatisfied creditors of W. Smith, and the personal and real estate duly administered and applied.

After appearance and before answer the plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees which were growing on the mortgaged premises, that many of such trees were lying upon the lands, and had been advertised for sale, and praying an account of the trees felled, and of the monies produced by the sale, and an injunction to restrain the felling and sale of trees from the mortgaged premises.

The plaintiffs moved for the injunction, according to the prayer.

VICE-CHANCELLOR [WIGRAM]. It is now an established rule that if the security of the mortgage is insufficient, and the court is satisfied of that fact, the mortgagor will not be allowed to do

that which would directly impair the security—cut timber upon the mortgaged premises. It has been argued that if the bill be for a foreclosure, when the mortgagee seeks to take the whole estate, the court will not prevent him [the mortgagor], pending that suit, from cutting timber or receiving rents, or doing any other act incident to the ownership; but that, if the plaintiff sued as a general creditor, the court would give him the relief by injunction. That, however, is not the distinction. The rule would be rather the other way. The plaintiff, in a foreclosure suit, asks nothing more than the estate, whilst the plaintiff, in creditors' suit, seeks the application, not only of the mortgaged estate, but, if necessary, of the general estate also, in payment of his debt. It is very difficult to suppose that a mere creditor can have any such right as the argument assumes. On what principle is the executor and trustee of real estate to be restrained at the suit of a general creditor from acting according to his judgment in the management of the property?

I think the allegation in the bill, that the mortgaged premises are a scanty security for the debt, is a sufficient foundation for admitting evidence of the value of the estate.

VICE-CHANCELLOR. The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1000, and the property to be worth £1000, that is, in one sense, a sufficient security; but no mortgagee who is well advised would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value. I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question whether the

court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect to the timber and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shewn, I am not told the quantity of the land, or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the defendant's affidavits, that he did not cut any of the trees with the intention of injuring the estate, but on the contrary he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious that the defendant is using language of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

Let the motion stand over, with liberty to apply. If the defendant proceeds to cut more timber, the plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.¹

PETERSON v. CLARK, 15 Johns. 205 (1818). PER CURIAM. There can be no doubt but that the deed from Van Camp to Clark, and defeasance given back, amounted only to a mortgage, and the simple question then is, whether a mortgagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage; for the waste alleged to have been committed in this case was before the expiration of the time limited for the payment of the money secured by the mortgage. Indeed, the present suit was commenced before that time. Waste is an injury done to the

¹ This represents the general rule in this country: *Brady v. Waldron*, 2 Johns. Ch. 148 (1816); *Fairbank v. Cudworth*, 33 Wis. 358 (1873); *Emmons v. Hinderer*, 24 N. J. Eq. 39 (1873); *Triplett v. Parmlee*, 16 Neb. 649 (1884), (*semble*); *Moriarty v. Ashworth*, 43 Minn. 1 (1890). That the right to an injunction to restrain waste by the mortgagor is absolute, see *Nelson v. Pinegar*, 30 Ill. 473 (1863).

inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder, or reversion; but it is expressly laid down by Blackstone (3 Bl. Com. 275), that he who hath the remainder for life only is not entitled to sue for the waste, since his interest may never, perhaps, come into possession, and then he has suffered no injury. So, likewise, with respect to the mortgagee, especially when the mortgage is not forfeited, his interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage; and it must follow, as matter of course, that he has not such interest in the timber as to sustain an action of trover. The judgment of the court below must be reversed.

CAMPBELL v. MACOMB, 4 Johns. Ch. 534 (1820). THE CHANCELLOR [KENT]. I cannot make it a condition of the order staying the sale, that the defendant should repair the dam. This would be a very extraordinary and dangerous interference with the exercise of the rights of a mortgagor, and is, in practice, unknown. Suppose the most valuable part of the mortgaged premises should consist of buildings, and they should accidentally be destroyed by fire; can the mortgagor be compelled immediately to rebuild? Is it not rather incumbent on the mortgagee, or the surety, to provide for such a case in the contract, or by insurance? It would bring distress and ruin upon a mortgagor, to charge him with burdens and duties not within the contemplation of his contract, and, therefore, not within his provident foresight. How far the court could or ought to interfere in a case of negligent or permissive waste, rapidly impairing the security, is a question which need not now be discussed; for the relief, if any, would not be by directing the mortgaged premises to be sold for a debt not due, or, under a decree of sale, to give an order to repair or a reference to assess damages. The necessity of any interference of any kind, in cases of mortgages, is exceedingly diminished by the consideration that the mortgagee can, if he pleases, relieve himself by obtaining possession of the land, and make, at his own expense, the requisite repairs, for which he would be allowed, in account, when the mortgagor came to redeem. It is also stated in this case that the present owner of the equity of redemption is in the act of repairing the dam; and it is so evidently his interest to do it, and his payment of the interest due on the mortgage, together with the costs, is such decisive evidence that the property is considered to be worth more than the debt charged thereon, that I should infer there was little or no foundation for the alarm discovered in the petition.

STOWELL v. PIKE.

SUPREME JUDICIAL COURT OF MAINE, 1823.

(2 Greenl. 387.)

In an action of trespass *quare clausum fregit*, the case was thus: The plaintiff, by his deed dated September 15th, 1819, bargained and sold the close described in the writ to one Bickford, in fee, taking from Bickford, at the same time, a mortgage of the same land, to secure the payment of the purchase money, for which Bickford also gave his notes of hand to the plaintiff, amounting to three hundred and thirty dollars, payable at different periods in the course of two years and a half, with interest. In the course of the spring following, Bickford paid his first instalment; and, in December, 1820, he sold all the timber then standing on the premises, to the value of two hundred and thirty dollars, to the defendant, Pike, and others, who, with the other defendants in their employment, without license from the plaintiff, cut it down and converted it to their own use, for which cutting this action was brought. Bickford continued in possession of the premises from the date of his deed till after the cutting of the timber, when the plaintiff entered upon him for condition broken, the residue of the purchase money being still due.

Upon these facts the parties submitted the cause to the decision of the court, the defendants waiving any objection to the form of action.

L. Whitman for the defendants. This case is distinguishable from *Smith v. Goodwin*, decided lately in Cumberland (*ante*, p. 173) in the circumstance of Bickford's being in possession of the premises at the time of the supposed trespass, and in his having paid all the purchase money then due. The decisions in Massachusetts are against any action in favor of the mortgagee for an injury to the mortgaged premises while in the possession of the mortgagor and so situated as to render it doubtful whether the mortgagee will claim to hold the land, or rely on his personal security (*Hatch v. Dwight & al.*, 17 Mass. 289).

In this country, the mortgagor, under circumstances like the present, must, from the usage of the country, even where no express agreement is proved, be considered as having license from the mortgagee to do the acts for which these defendants are sued. Here the deed and mortgage were of even date, the land was what is termed a wild lot, and the acts done by the defendants were such only as are necessary to reduce any similar lot to a state of cultivation and productiveness. It must have been known by the plaintiff

that such was the course to be adopted, else no motive can be assigned for the purchase. Such has been the well-known and undeviating usage from the first settlement of this country, respecting lands thus purchased, and it ought not to be disturbed upon light grounds. It is a reasonable practice, favorable to agriculture, and deserving, on the score of public policy, of all the encouragement which courts of justice can give.

Greenleaf and *Lincoln* for the plaintiff. The action is substantially by the mortgagee against the mortgagor, for stripping the land of its timber. The trees were fixtures, and therefore not removable by the mortgagor; and this, whether erected by him or not (*Elwes v. Maw*, 3 East, 38; *Smith v. Goodwin*, *ante*, p. 173). To the objection drawn from the general practice in these cases and from public policy, it is answered, 1, this was not a clearing up of the lot, for the purpose of agriculture, but a sale of all the timber then standing on it, and so is not the case supposed. 2. Whatever may be the rule of equity or good policy, the mortgagor is not brought within its principle, because he never applied to the discharge of his debt due for the land any part of the money obtained by the sale of the timber. Further, the indulgence here claimed amounts to a license, which is expressly negatived in the case stated. The mischiefs anticipated by the defendants may always be avoided in practice by pleading a license, and relying for proof on the general usage, which the jury will determine.

MELLEN, C. J., delivered the opinion of the court, as follows:

If A. mortgage lands to B. in fee, the legal estate is considered to be in B. as between him and A. and those claiming under A.; but as to all the world but B., A. is considered as seised of the legal estate, and so may convey to C., subject, however, to the mortgage (*Blaney v. Bearce*, *ante*, p. 132). For this reason, B. may maintain trespass against A. and those claiming under him, because A.'s possession is in submission to B.'s title, and is, in fact, the possession of B. In *Newall v. Wright*, 3 Mass. 138, Parsons, C. J., delivering the opinion of the court, says, "It is very clear that, when a man seised of lands in fee shall mortgage them, if there be no agreement that the mortgagor shall retain the possession, the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quit the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him, or he may, in a writ of entry, recover against him as a disseisor." There is nothing, then, in the relation between mortgagor and mortgagee, inconsistent with the nature of an action of trespass by the latter against the former; and surely a mortgagor, or one claiming under him, is not less liable for an injury to the mortgagee by cutting

down and carrying away timber and wood from the premises, than he would be by merely withholding the possession and receiving the rents and profits to his own use (*Union Bank v. Emerson*, 15 Mass. 159; Bro. Tr. 55, 362; 5 Rep. 13; Cro. Eliz. 784). We need not, however, rely on these cases, or decide on the form of action, as the parties have waived all objections to form, if any exist. But on these principles we decided the case of *Smith v. Goodwin*, cited for the plaintiff; and, on the same principles, we think the action maintainable, unless the alleged usage and general understanding with respect to felling trees and clearing wild lands, though mortgaged to secure payment of the purchase money, should be considered as preventing the application of those principles to a case like the present. It was urged by the defendant's counsel that such usage and general tacit understanding are equal to a license from the mortgagee to the mortgagor or his assignee, to do the acts which are charged in this action as a trespass. The facts in the case do not present this question. We have no means of knowing whether any such usage and general understanding exist. The argument of the counsel, therefore, cannot avail, as it does not apply. If such usage and understanding existed at the time of the transactions of which we have been speaking, and were considered as amounting to a license, and pleadable as such against the deed in question, they should have been disclosed in the form of a special plea, and the question arising thereon left to the decision of the jury. As the case stands, the plaintiff must have judgment for the value of the timber and costs, according to the agreement of the parties.¹

COOPER v. DAVIS.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1843.

(15 Conn. 556.)

This was an action of trover to recover the value of a pair of Burr mill-stones, taken by the defendant.

The cause was tried at New-Haven, January term, 1843, before Waite, J.

The plaintiff claimed title to the property in question, by virtue of a sale made to him by Walter S. Thompson and Charles Cooper.

¹ *Pettengill v. Evans*, 5 N. H. 54 (1829); *Dorr v. Dudderar*, 88 Ill. 107 (1878), accord. So in Vermont, after condition broken: *Langdon v. Paul*, 22 Vt. 205 (1850); *Hagar v. Brainerd*, 44 Vt. 294 (1872).

The defendant, who admitted the taking, claimed a right to do so, under the following circumstances. In October, 1839, he was the owner of an old grist-mill, and, having purchased a tract of land for the site of a new grist-mill, he entered into a written contract with Thompson Cooper and David O. Way, to build and complete the new mill. After they had erected the building for the new mill, and before it was completed according to the contract, *viz.* on the 21st of February, 1840, the defendant sold and conveyed to them the whole property owned by him, belonging to the old mill and the new one, including the mill-stones in question. To secure the balance of the purchase-money unpaid at the time of the sale, they afterwards, on the same day, gave two promissory notes, and executed and delivered to the defendant a mortgage deed of the same property. At this time said mill-stones had been taken from the old mill and placed by the side of the new one, to be used for its completion. They soon afterwards finished it, and put it in operation for grinding corn and other grain, using said mill-stones for this purpose. The lower stone was set in a frame, fastened to the floor of the mill, and was fastened therein by means of wedges driven between the stone and frame; and in all other respects the stones were placed in the mill in the manner in which mill-stones are usually placed in grist-mills.

Cooper and Way having failed to pay one of their notes after it became due, the defendant brought his bill for a foreclosure, and, at the term of the Superior Court in January, 1842, obtained a decree against them, limiting the time of redemption to the first Monday of July, 1842. At the same term the defendant recovered judgment against them in an action of ejectment for the mortgaged premises. He afterwards took out execution on this judgment, and placed it in the hands of an officer to be executed. The officer made demand of Thompson Cooper for the possession of the premises, who informed him that he lived upon them, and requested a delay of one week that he might remove his family therefrom; to which the officer consented. In the mean time Thompson Cooper repaired to the mill and removed therefrom the mill-stones, and sold them to the plaintiff, who carried them to a certain shed and placed them there for safe-keeping. The defendant afterwards found them in the shed, took them away and converted them to his own use; which is the taking complained of in the declaration. Cooper and Way, the mortgagors, continued in possession of the mill from the time of the sale made to them until after the removal of the mill-stones.

Upon these facts the plaintiff claimed that he was entitled to a verdict in his favour; that the mill-stones were not conveyed to the defendant by virtue of the mortgage deed and, consequently,

that he never had any interest in them; that the mortgagors, having placed them in the mill for the purpose of carrying on their business, might lawfully remove them at any time while they continued in possession; that having so removed them they might legally sell and deliver them to the plaintiff, and the plaintiff prayed the court so to instruct the jury.

The court did not so instruct them, but informed them that although the mill-stones were not conveyed to the plaintiff by virtue of the mortgage deed, yet, having been placed in the mill in the manner stated, they became annexed to the freehold, and the mortgagors had no right to remove them therefrom and convey them to the plaintiff, especially after a decree of foreclosure, and judgment in an action of ejectment against them.

The jury returned a verdict in favour of the defendant, and the plaintiff moved for a new trial for a misdirection.

Kimberly, in support of the motion, contended, 1. That the defendant never acquired any title to the property in question. In the first place, the mortgage deed does not purport to convey the machinery of the mill. Secondly, it appears by the motion that these stones were not in the mill at the time of the mortgage, but were placed there by the mortgagors afterwards. Thirdly, these stones, after they were placed in the mill, continued to be personal estate, and, of course, were removable at the pleasure of the owner (*Penton v. Roberts*, 2 East, 88; *Elwes v. Maw*, 3 East, 38; *Van Ness v. Pacard*, 2 Peters, 137; *Cresson v. Stout*, 17 Johns. R. 116; *Gale v. Ward*, 14 Mass. R. 352). Fourthly, at any rate, the purpose for which the stones were placed in the mill, and whether real or personal estate, were questions of fact for the jury and, as such, should have been submitted to them (*Gibbons on Fixt.* 6).

2. That if these mill-stones were so annexed to the building as that they became part of the realty, and thus a security for the debt, still, having been severed from the freehold whilst the mortgagors were in possession, they were unincumbered in the hands of their vendee. In the first place, the mortgagor continues the owner of the property mortgaged until foreclosure (1 Pow. Mort. 156, n. a; 4 Kent's Com. 155; 2 Sw. Dig. 165, 167; *Wakeman v. Banks*, 2 Conn. R. 446, 600; *Leonard v. Bosworth*, 4 Conn. R. 423; *Clark v. Beach*, 6 Conn. R. 159, 163; *Toby v. Read*, 9 Conn. R. 222; *Peterson v. Clark*, 15 Johns. R. 205; *Barkhamsted v. Farmington*, 2 Conn. R. 605). Secondly, the mortgage is a power to take possession and hold the premises as security; and if the mortgagor, whilst in possession, would impair the security contrary to good faith, the remedy is by injunction, not because the mortgagee is owner, but because the mortgagor is using the estate contrary to his agreement and to his good faith (2 Sw. Dig. 168.

172; 4 Kent's Com. 155; *Toby v. Read*, 9 Conn. R. 225). The mortgagee cannot sue the mortgagor for waste (*Peterson v. Clark*, 15 Johns. R. 205). Thirdly, the mortgagor being the owner, and in possession, has a right to use the property as his own, until restrained.

3. That the rights of the parties are not changed by the decree and judgment. In the first place, if the relation were changed, then the mortgagor would be liable for the mesne profits, which could not be. He would be entitled, also, to emblements. And he would no longer be liable to pay interest on the debt. Secondly, the action of ejectment was premature. Only one note had fallen due; and by the terms of the condition, the mortgagee was to take possession, on failure of the mortgagor to pay both notes. The time limited by the decree for redemption had not expired.

Baldwin, contra, remarked, 1. That it was apparent from the facts stated in the motion, that it was the intention of the parties that the mill-stones, which were to be used in the completion of the mill, were to constitute a part of the defendant's security.

2. That, independently of the contract which accompanied the mortgage deed, and formed part of the security, the mill-stones when placed in the mill became fixtures and part of the freehold, and, as such, were not removable by the mortgagors, even before the judgment in ejectment (Gib. Fixt. 19, 55; *Farrar & al. v. Shackpole*, 6 Greenl. 154; *Goddard v. Bolster & al.*, 6 Greenl. 427; 2 Serg. & Watts, 116).

3. That, by the recovery in the action of ejectment, all right of the mortgagors was at an end. In going upon the premises and removing the mill-stones, they were trespassers (*Hodgson & al. v. Gascoigne*, 5 B. & Ald. 88; 7 E. C. L. 35; 2 Bac. Abr. 438). The indulgence of the officer who held the execution conferred no such right (Gib. Fixt. 43; 1 H. Bla. 258; 1 Pow. Mort. 211). It was not necessary that the writ of execution should be executed, to put an end to the tenancy. The rights of the parties were to be determined by the judgment. In trespass for the mesne profits, it is only necessary to produce the record of the judgment in ejectment; proof of execution executed is not necessary (Bul. N. P. 87).

WAITE, J. The defendant claimed title to the mill-stones in question, by virtue of a mortgage made to him of certain real estate, upon which was situated a grist mill. He had obtained against the mortgagors a decree for a foreclosure, and a judgment for the possession, in an action of ejectment. But before the expiration of the time limited for the foreclosure, and before he had taken actual possession, the mortgagors severed the stones from the mill and sold them to the plaintiff. The defendant, having afterwards found them, took possession of them as his own property.

The question arising upon these facts was whether the plaintiff had thus acquired, as against the defendant, a valid title. Upon the trial in the court below it was supposed that, after a decree for a foreclosure had been passed, and a judgment rendered in an action of ejectment for the possession, the mortgagors might be considered as trespassers in removing the fixed machinery and disposing of it in the manner stated in the motion.

The law recognized in the case of *Hodgson v. Gascoigne* was thought to be applicable to the present (5 B. & Ald. 81; 7 E. C. L. 35). It was there holden that after a landlord had recovered judgment against his tenant in an action of ejectment for the possession of the demised property, the tenant ceased to have any interest in the growing crops, and the sheriff had no right to levy an execution upon them.

But, upon consideration, we are all satisfied that the principle laid down in that case does not apply to the present. There, the question was as to the relative rights of a landlord and tenant; here, as to the rights of a mortgagor and mortgagee.

By repeated decisions it is now fully established that a mortgagor, before his right of redemption is foreclosed, continues the owner of the real estate mortgaged; that he is not accountable for the rents and profits, nor liable, in an action at law, for waste committed while in possession. The mortgagee has merely a lien upon the property for the security of his debt, by virtue of which he may obtain possession, and appropriate the pledge in payment of his debt.

The mortgagor has, indeed, no right by the commission of waste to render the security inadequate. But the appropriate remedy for such conduct is by way of injunction. If the security is impaired by cutting and carrying away the wood and timber, the mortgagee has no power to seize them after they have been severed and carried away; but his duty, in such case, is to restrain the mortgagor from such acts by an injunction.

These general principles are not denied. But it is claimed that the rights of the defendant have been varied by the judgment in his favour for the possession. But we do not see that that circumstance can make any material difference. He had not taken actual possession; nor had his title to the property become absolute by the decree. He stood, simply, in the character of mortgagee out of possession. His further proceedings in relation to the mortgage might at any time have been arrested by paying him his debt. His interest in the property continued to be but a lien. The mortgagors continued in possession, and as such were the owners. The mill-stones, after they had been severed from the mill, removed and sold, could not be reclaimed by the defendant by virtue of his

mortgage. And although the design of the mortgagors probably was to impair the defendant's security, and prevent him from collecting the full amount of his debt, yet we cannot say that he is entitled to relief in the manner in which he has sought it. His duty was to have protected his rights by an application for an injunction.

Upon this ground, therefore, without adverting to the other questions, which we do not consider it necessary to examine, we think a new trial must be granted.

In this opinion the other Judges concurred.

New trial to be granted.¹

VAN PELT v. M'GRAW.

COURT OF APPEALS OF NEW YORK, 1850.

(4 N. Y. 110.)

Van Pelt sued Southworth and McGraw in the Court of Common Pleas of Tompkins County, and declared in case for wrongfully and fraudulently removing rails, timber, &c. from certain lands on which the plaintiff held a mortgage, thereby injuring his security, &c. It was proved on the trial that in May, 1840, Almeron Baily and William E. Baily, being the owners of 119 acres of land in Dryden, Tompkins County, executed a bond and mortgage covering the same to Harvey A. Rice, to secure the payment of \$500, one half payable in May, 1841, and one half in May, 1842. In August, 1842, Rice sold and assigned the bond and mortgage to the plaintiff, who instituted a foreclosure suit thereon, and obtained the usual decree for the sale of the premises in August, 1844. The amount then due on the mortgage, including the costs of the foreclosure suit, was nearly nine hundred dollars. The mortgagors were insolvent, and the premises were an inadequate security for this sum. On the sale under the decree, which took place in October, 1844, the premises produced only the sum of \$575. Shortly before the sale and while the advertisement was running, the defendant McGraw, who had become the owner of the equity of redemption by conveyance from the mortgagors, avowing that he would "strip

¹ *Kircher v. Schalk*, 39 N. J. L. 335 (1877); *Vanderslice v. Knapp*, 20 Kans. 647 (1878); *Triplett v. Parmlee*, 16 Neb. 649 (1884); *Vernor v. Betz*, 46 N. J. Eq. 256 (1889), *accord*. Compare *Buckout v. Swift*, 27 Cal. 433 (1865), and *Hill v. Gwin*, 51 Cal. 47 (1875).

the land," proceeded to draw off rails, and to cut down and draw off valuable timber, &c. The premises were thereby considerably lessened in value. These acts were done by McGraw, and by Southworth aiding and assisting him, with full knowledge of the plaintiff's mortgage, and of the insolvency of the mortgagors.

The defendants' counsel requested the court to charge the jury that McGraw, having the fee of the land and being in possession, had a right to take off the fences and timber, and that these acts, being lawful, could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but if the defendants had impaired that security with a knowledge of the lien, then their acts were wrongful and fraudulent. The defendants' counsel also requested the court to charge that, inasmuch as the plaintiff had alledged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove those allegations by other evidence than the mere removal of the rails and timber for their own emolument. The court refused so to charge. To the charge as delivered and to the refusal to charge as requested, the defendants excepted. The jury found a verdict of \$150 in favor of the plaintiff. The judgment entered thereon was affirmed in the Supreme Court on error brought. The defendants appealed to this court.

PRATT, J. There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties (1 Cow. Treat. 3).

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights, and any attempt on his part to impair the mortgage as a security was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joice*, 11 John. 136, was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon which the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case

was referred to and approved in *Lane v. Hitchcock*, 14 John. 213, and in *Gardner v. Heartt*, 3 Denio, 234. Nor is there any thing in the case of *Peterson v. Clark*, 15 John. 205, which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seisin. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

It only remains, therefore, to be considered whether there was any error in the charge of the court. In order to come to a correct conclusion upon this point, it becomes necessary to examine the exceptions to the charge in connection with the undisputed testimony in the cause, and the propositions upon which the court were required to charge. It had been proved that the defendants knew of the mortgage, that the mortgagors were insolvent, and that the property had been advertised for sale by virtue of the mortgage. They were forbid to remove the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by such removal. Under this state of facts the defendants' counsel asked the court to charge the jury that McGraw, having the fee of the land and being in possession, had a right to take off the fences and timber; that the acts being lawful could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but that if they had impaired the security, knowing the plaintiff's lien, they were liable. As an answer to the propositions of the defendants' counsel, the charge was correct. Acts may be harmless in themselves, so long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maxim is based, *sic utere tuo ut alienum non laedas*. As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any wilful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie.

The defendants' counsel also asked the court to charge that, the

plaintiff having alledged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused so to charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's mortgage as a security would be impaired, they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act, knowing that his neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result. Upon the whole, therefore, although the charge is not quite so explicit as it should be, yet taken in connection with the propositions presented to the court, I think it was substantially correct. The judgment of the Supreme Court should be affirmed.

*Judgment affirmed.*¹

WILSON v. MALTBY.

COURT OF APPEALS OF NEW YORK, 1874.

(59 N. Y. 126.)

Appeal from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term denying a motion for a new trial.

This action was brought for the foreclosure of a mortgage made by the defendant, George Hubbard, and wife. Plaintiff sought to recover of defendants, C. S. Maltby and Thorn J. Houston, in case the mortgaged premises should not realize, upon sale, sufficient to pay the mortgage debt, the value of certain wood cut upon the

¹ *Waterman v. Matteson*, 4 R. I. 539 (1857); *Jackson ads. Turrell*, 39 N. J. L. 329 (1877), *accord.* *Adams v. Corriston*, 7 Minn. 456 (1862), *contra.* Compare *Allison v. McCune*, 15 Oh. Rep. 726 (1846).

mortgaged premises, the complaint alleging fraud and collusion between them and the mortgagor.

Hubbard purchased the premises in question, being mostly woodland, of plaintiff's intestate, in 1867, subject to a mortgage thereon held by one Knapp, giving the mortgage in suit for part of the purchase-money. In 1871 Hubbard entered into a contract with Maltby and Houston, by which he sold to them the wood growing on the mortgaged premises, the same to be cut by the purchaser, measured and paid for March 1, 1871. Plaintiff, learning that the wood was being cut, called upon Hubbard and threatened to stay the cutting by injunction; but, upon Hubbard agreeing to pay over the money received for the wood on the Knapp mortgage, he abandoned the intent. On the 27th February, 1871, after the wood was all cut, plaintiff, being apprehensive that Hubbard would not do as he agreed, notified the purchasers of the wood of his lien, of the agreement with Hubbard, and communicated to them his fears, requesting them to delay paying over the purchase-money; this they declined to do, but paid the same to Hubbard, as agreed, on the first of March. Up to the time of such notice they had no knowledge that there was any mortgage upon the premises, and the allegations of fraud were not proved. Hubbard did not pay it over, as agreed, but absconded therewith. The mortgaged premises were insufficient to pay the mortgages.

ANDREWS, J. The contract for the purchase of the wood was made by the defendants, Maltby and Houston, with Hubbard, the owner of the land from which it was taken. Hubbard was in possession of the premises, and, by the contract, the defendants were to cut the wood and to pay Hubbard a certain price per cord on the 1st of March, 1871. The defendants did not know until on or about the 24th of February, 1871, of the plaintiff's mortgage, or that there was any incumbrance on the land. The wood had then been cut, and nothing remained to be done by the defendants under the contract, except the payment of the purchase-price. There can be no doubt that the title to the wood vested in the defendants upon its severance from the land. They were the owners of the wood by purchase from the owner of the land, and were debtors to Hubbard for the agreed price. The fact that the land was mortgaged when the contract was made, or when the wood was cut, did not affect the defendants' title to the severed property, and although the cutting of the wood impaired the security of the mortgage, the defendants were not responsible to the mortgagees for the resulting injury, unless they cut the wood knowing of the lien and with intent to injure the plaintiff in respect to his security (*Van Pelt v. McGraw*, 4 Const. 110). There is an additional reason in this case why the plaintiff is precluded from treating the

act of the defendants, in cutting the wood, as tortious, or as a violation of his rights or equities. After he was informed that the defendants were cutting the wood, he took no proceeding to prevent a continuance of the waste, but allowed the work to proceed upon the promise of Hubbard that he would apply the money he should receive from the defendants upon the Knapp mortgage. The promise was made in December, and it was not until the following February that he notified the defendants of his claim on the premises, and at that time they had completed the work under the contract with Hubbard. This transaction operated as a license to Hubbard to sell the wood to the defendants, and estopped the plaintiff from questioning their title. The question then comes to this: Could the defendants lawfully pay their debt to Hubbard, against the protest of the plaintiff, after being informed that Hubbard threatened to violate his agreement to apply the money on the prior mortgage? There can be but one answer to this question: The defendants' contract was with Hubbard alone, and their debt was owing to him. The promise of Hubbard to apply the amount he should receive from the defendants on the Knapp mortgage did not make the plaintiff the assignee of the debt. It gave to the plaintiff at most a right as against Hubbard to intercept the payment upon proceedings taken, based upon evidence that he threatened to dispose of the money in violation of his agreement.

We express no opinion whether such an action could be maintained, but we think it is clear that, until prevented by the order of the court, the defendants could lawfully pay the debt to Hubbard, and that, if they had refused, he could have maintained an action to recover it. The defendants were neither parties nor privies to the agreement between Hubbard and the plaintiff, as to the application of the fund, and they owed no legal duty to the plaintiff to defer the payment of their debt at his request. That agreement recognized Hubbard's right to receive the payment, and no legal proceedings having been taken to prevent it, the payment to him was a valid discharge of their obligation. In view of the finding of the jury, it cannot be claimed that they colluded with Hubbard in the transaction, or misled the plaintiff, or induced him to institute legal proceedings against Hubbard upon the promise to retain the money until an injunction should be procured.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ *Augier v. Agnew*, 98 Pa. St. 587 (1881), *accord*.

SEARLE v. SAWYER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1879.

(127 Mass. 491.)

MORTON, J. This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of wood-land, mortgaged it to the plaintiff's testator; and that, after the condition of the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Superior Court ruled that, "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion (*Peterson v. Clark*, 15 Johns. 205; *Cooper v. Davis*, 15 Conn. 556). On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him (*Gore v. Jenness*, 19 Maine, 53; *Frothingham v. McKusick*, 24 Maine, 403; *Smith v. Moore*, 11 N. H. 55; *Langdon v. Paul*, 22 Vt. 205; *Waterman v. Matteson*, 4 R. I. 539).

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the conclusion that a mortgagee out of possession is entitled to timber, fixtures and other parts of the realty wrongfully severed, and may recover them, or their value, if a conversion is proved. In *Fay v. Brewer*, 3 Pick.

203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of *Peterson v. Clark*, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own." In *Page v. Robinson*, 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied from the mortgagee. In *Cole v. Stewart*, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land. In *Butler v. Page*, 7 Met. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

In *Wilmarth v. Bancroft*, 10 Allen, 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defence. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures." So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security (*Gooding v. Shea*, 103 Mass. 360; *Byrom v. Chapin*, 113 Mass. 308; *King v. Bangs*, 120 Mass. 514).

The fair result of these authorities is that, under our law, a mortgagee is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use (*Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water Power Co.*, 11 Cush. 11). But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is

wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in *Smith v. Moore*, 11 N. H. 55, and approved in *Page v. Robinson*, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel (*Woodward v. Pickett*, 8 Gray, 617). And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.

CHAPTER II.

EQUITY RELATIONS.

SECTION I. ONCE A MORTGAGE, ALWAYS A MORTGAGE.

HOWARD v. HARRIS.

HIGH COURT OF CHANCERY, 1681.

(1 *Vern.* 33.)

Howard mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body may redeem.¹ The question was, whether his assignee should redeem it? and it was decreed he should; for if once a mortgage, always a mortgage.

In this case part of the mortgaged estate happened to be in Mrs. Howard's jointure, and it was admitted that she thereby was entitled to a redemption of the whole mortgage; and so it was adjudged in the case of Browne and Edwards.²

NEWCOMB v. BONHAM.

HIGH COURT OF CHANCERY, 1681, 1683, 1684.

(1 *Vern.* 7, 214, 232.)

A man being seised of lands in fee, makes an absolute conveyance

¹ The words of the proviso are "that if he or the heirs of his body paid the £565, the mortgage money, and interest at two years' end, the conveyance to be void." Then a further sum of money was borrowed by Howard; and the above-mentioned proviso was released by deed, and another proviso contained in such last-mentioned deed "that if he or the heirs of his body begotten should, at a given day therein mentioned, pay £1000, then," &c. And in this case there was a covenant on the part of the mortgagor that no person should have the power or benefit of redemption, but only himself and the heirs of his body. On the effect of such a covenant, *vide Newcomb v. Bonham, ante*, p. 7, note. In the principal case a plea as to the redemption was put in, but overruled.—*Rep.*

² Reg. Lib. 1681, A. fol. 260.

thereof to the defendant Bonham; but by another deed of the same date the lands are made redeemable upon payment of £1000 and interest at any time during the life of the grantor; and in case the lands should not be redeemed in his lifetime, then he covenants that the same should never be redeemed. The grantor dies before the lands are redeemed, and his heir at law exhibits a bill to have a redemption.

It was a proof in the cause that the mortgagor had a kindness for the mortgagee, as being his near relation, and did intend him the lands after his death, and that the clause of redemption was put in only upon the account that the mortgagor was then a bachelor, and so might marry and have issue; but that his full intent was that in case he died without issue the mortgagee should have the lands absolutely without redemption; and also that the said one thousand pounds was really the full value of the estate at the time of the conveyance, but it afterwards happened to be a good bargain, it being a reversion after two lives, and the two lives happening to die within a short time: and it was urged that the mortgagee run hazard enough, for that as it happened to be a good bargain, it might have been a bad one, and yet he had no covenant nor other remedy to compel the repayment of his money, for the mortgagor had time to redeem during life; and suppose the mortgagor should have lived thirty or forty years after the mortgage made, and then had come to redeem, as he might have done, there had been all the interest upon interest thereby lost, which comes to more than the principal.

The LORD CHANCELLOR [NOTTINGHAM] was of opinion that although the mortgagor had time to redeem during life, yet the mortgagee might have compelled him to redeem, or have foreclosed him: and said that it was a general rule, once a mortgage and always a mortgage; and in regard the estate was expressly redeemable in the mortgagor's lifetime, it must continue so afterwards, and therefore decreed an account and a redemption.¹

This case came now before the court upon a demurrer to a bill of review to reverse a decree made in this cause by the Lord Chancellor Nottingham; and the error assigned was that the defendant Newcomb ought not to be admitted to a redemption against his express agreement in the mortgage deed to redeem within a certain time, or otherwise that the estate should be irredeemable.

It was argued for the demurrer,

¹ And also *per* Lord Chancellor, that the deeds of lease and release being but a security, the same could not be extinguished by any covenant or agreement at the time of making the mortgage. Reg. Lib. 1680, B. 538, *vide* *Roscarrick v. Barton*, 1 Ch. Ca. 217.—*Rep.*

1st. That an estate could not be a mortgage at one time and afterwards become an absolute purchase by one and the same deed.

2dly. That the mortgagee in this case had a proper remedy, and might have made his estate absolute in a legal course, viz., by exhibiting a bill to foreclose the mortgagor of the equity of redemption: and they cited the case of *Yieldmington* and *Gardiner*, where mortgagor was to redeem during life only, and yet his heir admitted to the redemption; and *Sir Robert Jason's* case, where an estate was to go to his wife and her heirs, unless a sufficient jointure were settled within such a time limited in the deed; and the case of *Howard* and *Harris*.

But as to that case it was answered though there was a qualified redemption, yet there was an express covenant for repayment of the mortgage money, and so it was in the power of the mortgagee to make it a mortgage at any time.

But the LORD KEEPER [SIR FRANCIS NORTH] inclined to reverse the decree, for that *modus & conventio vincunt legem*; and all conditional purchases or bargains must not be turned into mortgages: and said that where there is a condition or covenant that is good and binding in law, equity will not take it away.

It was objected against the bill of review that they had assigned errors collected from the proofs in the cause that did not appear in the body of the decree.

But the LORD KEEPER observed that was occasioned by the ill way they had got of late in drawing up decrees in general without particularly stating the matters of fact; and said the plaintiff in a bill of review should not be concluded by it, unless the matter of fact were particularly stated in the decree.

At last it was agreed by the counsel to wave the signing and enrolling the decree by consent, and to hear the cause again *de integro*.

This cause coming on to be heard *de integro* before the LORD KEEPER, he adhered to his former opinion that there ought to be no redemption in this case; and principally because it was proved in the cause that the intent and design of the mortgagor was to make a settlement by this mortgage, and that he intended a kindness and benefit to the mortgagee in case he should not think fit to redeem this estate in his lifetime; and that there being an express covenant that the mortgagor might redeem at any time during his life, he thought he could not in equity have been debarred of that privilege; for by a bill to foreclose a man you shall only bar him of his equitable title when the estate in law is become forfeited; but where he has a continuing title at law, as in this case an express proviso that

he might redeem at any time during life, he thought equity could not debar him of that privilege; and therefore, being the mortgagee in the present case, could not have compelled the mortgagor to redeem, and he might have lived so long as to have made it an ill bargain; and now, when by a contingency it happens to be a good bargain, there is no reason to raise an equity from thence to take the estate from the mortgagee, especially in this case there being a kindness and benefit intended him by the mortgagor: and therefore reversed the Lord Nottingham's decree, and dismissed the original bill for a redemption.¹

BATTY v. SNOOK.

SUPREME COURT OF MICHIGAN, 1858.

(5 Mich. 231.)

Appeal from Macomb Circuit in Chancery.²

MANNING, J.: The bill in this case is very inartificially drawn; so much so that, on first reading it over, one is at a loss to know whether it is for the redemption of mortgaged premises, for the specific performance of a contract, or to set aside certain transactions for fraud. We mention this, as the merits of a case may sometimes be overlooked or lost sight of by reason of the rubbish under which it is concealed. We think, however, there are sufficient facts stated, when separated from the irrelevant or immaterial matter, to enable us to treat it as a bill to have a certain deed and contract relative to real estate declared a mortgage, and for redemption of the mortgaged premises. As such we shall consider it.

Complainant purchased of the defendant, Warner, in 1853 a lot in the village of Mt. Clemens, on which there was a saw mill. On the 5th of April, 1854, the premises were deeded by Warner to complainant, who at the same time, to secure a part of the purchase-money, mortgaged the lot to Warner for \$2331.26, payable with interest—\$500 on the 18th November, 1854; \$500 in one year thereafter; the like sum in two years; and the balance, being \$831.26, in three years. The complainant soon thereafter, and in

¹ Reg. Lib. 1683, A. fol. 482. And this dismissal was afterwards, 1 May, 1689, affirmed in Parl.: Journ. House of Lords, 14 vol. *And Beahan v. Newcomb*, 2 Vent. 365 and 193.—*Rep.*

² The facts are sufficiently stated in the opinion.

less than a year, became embarrassed in his business, and was unable to pay Warner and his other creditors what he was owing them. He was indebted to Warner in a large sum over and above the mortgage debt, and Warner, being aware of his pecuniary difficulties, was solicitous to get his debt secured—that is, that portion of it not included in the mortgage; and went twice from Saginaw, where he was residing, to Mt. Clemens, to see if he could not make some arrangement with complainant for that purpose. On his last visit a settlement took place between the parties, from which it appears complainant turned out property in part payment of what he was owing him, leaving a balance still due Warner of \$2000. Warner, to effect the settlement, was induced to take the property at more than its value. In pursuance of this settlement, the mortgage from complainant to Warner was canceled, and the mortgaged premises were deeded back to Warner by complainant. This deed bears date on the 6th February, 1855.

There is also a contract between the parties for the repurchase of the premises by complainant. This contract bears date February 7th—the day after the deed. Were the two instruments parts of one and the same transaction, or were they separate and distinct transactions? The difference in their dates favors the latter view, but it is by no means conclusive. The bill alleges both had their origin in the settlement, and that they are parts of the same transaction, and were intended as security for the payment of the \$2000. The answer, instead of denying this in clear and explicit terms, as it should have done if it was not the truth, we think admits it. Referring to Warner's second visit, the answer says he (Warner) was about to return home when complainant stated to him he had a horse and buggy and a certain promissory note he would let him have if "he would release all complainant was owing him aside from the mortgage and a part of the latter, and extend the payment due on the mortgage to the 1st of December, 1855." The answer then proceeds: "That this defendant, thinking he could do no better, then and there agreed to take said note and horse and buggy and a deed of said saw-mill lot and mill, and entered into contract A" (the contract of 7th February, 1855, already spoken of), "with the design and express understanding on the part of said complainant and this defendant, if he (the said complainant) failed in any particular in complying with said contract A, that he (the said complainant) should have no right at law or in equity to the said lands and saw mill; and said contract A was particularly and expressly conditioned to be the same as an original contract for the conveyance of land, in which time should be material, and every requisite on the part of said complainant to be done and performed should be by him literally complied with."

Here is an admission of complainant's case by the answer. It admits the deed and contract are parts of one transaction, and that the object of them was to secure the balance of complainant's debt to Warner. It also shows that if complainant failed to pay promptly when the debt became due, he was to forfeit all right at law and in equity to the premises he had conveyed to Warner, and that to effect this object it was agreed the contract should be considered and treated as an original contract for the purchase of the premises, in which time should be material. When the arrangement was entered into there was but one payment due on complainant's mortgage of the 5th April, 1854, and one other that would become due before the 1st December, 1855, when complainant was required to pay \$500 on the contract of 7th February, which also provided for the payment of the remaining \$1500 in one year thereafter—nearly a year before the last installment would have fallen due on the mortgage given in 1854. The contract contained a covenant for the payment of the \$2000, and by it complainant was to retain possession of the premises and was not to remove any buildings or machinery.

Other facts might be mentioned to show the mortgage of '54 was canceled, and the deed and contract of the 6th and 7th February, '55, were made to secure the \$2000 complainant was owing Warner; but it is unnecessary to notice them or to go into the proofs to establish what is admitted by the answer.

The only remaining question is, whether the case is one proper for the interposition of a court of equity.

Once a mortgage, always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a contemporaneous or subsequent¹ executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures. What we now call a mortgage was at common law a conditional conveyance of the land, by which the title of the vendee was to terminate or become absolute on the performance or non-performance of the condition of the grant by the vendor at the day. When such conveyance was made to secure a debt, or for the performance of some other act by the vendor, equity took cognizance of the transaction

¹ Compare *Wynkoop v. Cowing*, 21 Ill. 570 (1859).

and declared the conveyance a security merely for the payment of the debt or doing of the act, and on the performance thereof by the vendor, after the day had elapsed and the estate had become absolute, would decree a reconveyance of the premises. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments instead of one to effect the object.

Snooks, the other defendant, to whom Warner conveyed on the 22d December, 1855, purchased with full knowledge of complainant's equities. He took possession soon after, and has been in possession ever since.

The decree of the court below, dismissing the complainant's bill with costs, must be reversed and a decree be entered declaring the deed and contract one transaction and to be a mortgage, and that complainant is entitled to redeem; and the transcript must be remitted to the court below for further proceedings.

The other justices concurred.

MOONEY v. BYRNE.

COURT OF APPEALS OF NEW YORK, 1900.

(163 N. Y. 86.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 20, 1897, affirming a judgment in favor of defendants, entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

VANN, J. The case made by the complaint was that of a mortgagor with a right to redeem from a mortgagee or his devisees in possession. The defendants denied that there was any mortgage, alleged an absolute conveyance from the plaintiff to one Owen Byrne, and a subsequent conveyance from the latter to a *bona fide* purchaser. They also pleaded the Statute of Limitations and specified the period of six and ten years as the limit exceeded by the plaintiff in bringing her action.

The facts agreed upon by the parties and admitted by the pleadings are in substance as follows: On the 14th of August, 1878, the

plaintiff owned and was in possession of a parcel of land in the city of New York worth \$10,000 and upwards, and at the same time she was indebted to Owen Byrne in the sum of about \$3000, secured by three mortgages on said premises, which were under process of foreclosure. In order to secure the payment of this indebtedness she conveyed the land to said Byrne at his request by a deed dated on the day last named and duly recorded. "The said deed was given as security" and for no other purpose. It contained full covenants, subject to said mortgages, which, as it was declared, "shall not merge in the fee, but shall remain valid and subsisting liens." Said Byrne at the same time gave back a defeasance of even date whereby he agreed to reconvey to the plaintiff upon the payment to him within one year of said indebtedness certain advances which he agreed to make for her benefit and the costs of the foreclosure proceedings. It was stipulated that she should be relieved from personal liability on the bonds and that no judgment for deficiency should "be claimed or entered against her in any action that may be taken upon said bonds or mortgages so long as she and all persons claiming under her shall not dispute or contest the title of the " said Byrne "or his assigns to said mortgaged premises or the amounts due him on said mortgages. . . ." Said instrument also provided "that as to the agreement by the " said Byrne "to reconvey said premises, time is of the essence thereof, and, further, that this instrument shall not be recorded by or on behalf of the " plaintiff, "and that for a violation of this provision this agreement, so far as the same provides for such reconveyance, shall thereupon become utterly null and void." The defeasance was never recorded.

Said Byrne at once took possession of the premises and remained in possession thereof until the 13th of June, 1881, when he conveyed to one Walker by a deed duly recorded, but "said conveyance was made without the consent of the plaintiff, who had no knowledge of it until this action was begun" on the 7th of March, 1895. Said Byrne died on the 11th of January, 1889, leaving a will by which he gave all his property, real and personal, to the defendants. His executor accounted and has been discharged, and the property of the testator has been delivered to the defendants. The plaintiff claimed that the rents and profits of the premises received by Byrne amounted to more than the principal and interest of the debt secured. She alleged in her complaint that if Byrne had conveyed the premises to any one, such conveyance was made without her knowledge or consent. She demanded an accounting as to the amount due from her, and that she might "be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay,"

and that the defendants be compelled to convey said premises to her. She also demanded alternative and general relief. Said Walker, who still owns the premises, was not made a party to the action. The trial judge dismissed the complaint upon the ground that "the Statute of Limitations is a conclusive defense," and the Appellate Division affirmed, on an opinion rendered in overruling a demurrer to the answer, when the case was in the first department (15 App. Div. 624; 1 *id.* 316).

The facts agreed upon show that there was a mortgage; for a deed, although absolute on its face, when given as security only, is a mortgage by operation of law (*Horn v. Keteltas*, 46 N. Y. 605; *Meehan v. Forrester*, 52 N. Y. 277; *Odell v. Montross*, 68 N. Y. 499; *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1, 5; *Kraemer v. Adelsberger*, 122 N. Y. 467; *Macauley v. Smith*, 132 N. Y. 524; 15 Am. & Eng. Encyc. 791; 1 R. S. 756, sec. 3; Laws 1896, ch. 517, sec. 269). While there was no covenant to pay the debt, none was needed, for the property was worth much more than the amount of the indebtedness, and the mortgagee could safely confine his remedy to the land (1 R. S. 739). The absence of such a covenant, the conditional release of any claim for deficiency, and the agreement not to record the defeasance, are of no importance in view of the express admission that the deed was given as security. The deed and defeasance were executed at the same time, and as the latter in express terms refers to the former, they must be construed the same as if both were embodied in a single instrument. When read together in the light of the admission that the object was to secure a debt, it is clear that the transaction was not a conditional sale, and that the covenant making time the essence of the contract to reconvey has no more effect than if it occurred in the defeasance clause of an ordinary mortgage. An instrument executed simply as security cannot be turned into a conditional sale by the form of a covenant to reconvey, and even if there was a doubt as to the meaning, the contract would be regarded as a mortgage, so as to avoid a forfeiture, which the law abhors (*Matthews v. Sheehan*, 69 N. Y. 585). As was said by the Supreme Court of the United States: "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. . . . It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property

upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates" (*Peugh v. Davis*, 96 U. S. 332, 336).

The right to redeem is an essential part of a mortgage, read in by the law if not inserted by the parties. Although many attempts have been made, no form of covenant has yet been devised that will cut off the right of a mortgagor to redeem, even after the law day has long passed by (*Clark v. Henry*, 2 Cow. 324, 331; *Jones on Mortgages*, § 1039). Even an express stipulation not to redeem does not prevent redemption, because the right is created by law. For the same reason an express power to sell at private sale after default is of no effect. "If," said Chancellor Kent, "a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule that the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance in which the creditor, holding land in pledge, was allowed to sell at his own will and pleasure. It would open the door to the most shameful imposition and abuse" (*Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100). The utmost effect claimed for the provision that the defeasance was not to be recorded is that it was a consent to a private sale after default. As was well said by a recent writer: "If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and incumbrance of the mortgage; the equitable right of redemption, after a default, is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right" (3 Pomeroy's Eq. Jur., § 1123). So Mr. Thomas says that "it was a bold but necessary decision of equity that a debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem" (*Thomas on Mortgages*, § 9).

To prevent undue advantage through inadequacy of consideration, either with or without an opportunity to repurchase, the courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the

rights and are subject only to the obligations of mortgagor and mortgagee (*Lawrence v. Farmers' L. & T. Co.*, 13 N. Y. 200). In the case before us there was no purchase of the land by Owen Byrne, for the existing relation of debtor and creditor between himself and the plaintiff was not ended, but was continued by a contract intended to secure the old debt, together with some further advances. He had a lien on, but no estate in, the land (*Thorn v. Sutherland*, 123 N. Y. 236; *Hubbell v. Moulson*, 53 N. Y. 225, 228). She had the right to redeem and he the right to hold the land until she redeemed, or her right of redemption was cut off by the judgment of a court of competent jurisdiction. The continued existence of the debt is the birthmark of a mortgage, and that is involved in the concession that the land was conveyed as security. The passing of the law day did not extinguish her right, for "once a mortgage, always a mortgage" is a maxim so sound and ancient as to be a rule of property. As the deed was a mortgage when given, it did not cease to be a mortgage after the period of redemption had expired. In *Macauley v. Smith*, *supra*, it was held that the surrender of possession by the grantor to the grantee after the debt became due did not prevent the levy of an attachment, issued in behalf of creditors of the former, upon lands conveyed to the latter as security.

The plaintiff, therefore, is a mortgagor, whose right to redeem from the mortgagee in possession has not been cut off nor cut down by any act or omission on her part. As the defendants stand in the shoes of Owen Byrne, with no rights except by way of gift under his will, the case is the same in principle as if he were living and the sole defendant. After the plaintiff had established her right to redeem as to him what answer could he make thereto? Would it be an answer for him to say, "I have conveyed the lands away, and, therefore, you cannot redeem?" While this would be a conclusive answer in behalf of Walker, the present owner of the land, if he had been made a party and the right to redeem had been asserted against him, can Owen Byrne or his devisees say that, by his wrongful act in conveying the land, he deprived the plaintiff of the right to redeem in any form and confined her to an action for the moneys received on the sale, to which the Statute of Limitations would be a bar? Can a mortgagee by his own act, without a judicial sale or the consent of the mortgagor, destroy the right to redeem, which is so carefully guarded by the courts? The mortgagee could not, by selling the mortgaged premises, change the rights of the plaintiff as against himself. As to him, she still has the right to redeem, for by his act, without her knowledge or consent, he could not annul his covenant to reconvey. That covenant is still in force, and the plaintiff may compel its performance, so

far as the rights of third parties, acquired under the Recording Act, will permit. As Owen Byrne conveyed to a *bona fide* purchaser, the plaintiff cannot follow the land as such, but she is not prevented by that wrongful act from any form of redemption now practicable. No act of his could utterly destroy her cause of action to redeem. He might affect its value, but he could not take its life. As a substitute for a decree requiring him to repurchase the land and convey it to her, which might be impossible and would be apt to involve hardship, she may treat the value of the land, measured in money presumed to be in his hands when her right to redeem was established, as land, and enforce the right of redemption accordingly. Unless we virtually sanction his wrongdoing by permitting him to defeat her right of redemption absolutely by his own act, upon showing a right to redeem she must be permitted to make the best redemption possible as against him. Because he has put it out of his power to render to her all she is entitled to, he cannot refuse to make the nearest approach to it that is left. A court of equity, in order to bring about an equitable result, disregards forms and treats money as land and land as money when required to prevent injustice. A mortgagee in possession under a recorded deed, absolute on its face, with an unrecorded defeasance, cannot sell the land and claim that the purchase price is money as against one who has an equitable right to insist that in legal effect it is land. As the plaintiff established a right to redeem, Owen Byrne and his devisees cannot complain if, in working out the relief required by the violation of his covenant, the court does the best it can to right the wrong by treating the money as land. In order to prevent him from making a profit out of his wrong, the law raises the presumption that he now has the full value of the land as a separate fund in his hands, and treating it as land allows the plaintiff to redeem, the same as if it were in fact land. As against the wrongdoer and his estate it will exert all its power to make the plaintiff whole, paying due regard to equities arising through improvements upon the land, so as not to give her more than she is equitably entitled to.

Thus, in *Meehan v. Forrester*, *supra*, the court, through RAPALLO, J., said: "The sale was shown to have been made without the consent of Meehan and in violation of his rights, and it does not appear that the plaintiff ever had notice of it. He was not bound by such a sale. He was entitled to his land on payment of the amount due to Bertine or his representatives. If Bertine, by reason of his own wrongful act, had deprived himself of the ability to restore the land to which the plaintiff is equitably entitled, he or his representatives were bound to account to the plaintiff, at his election, either for the proceeds of sale of the land or its value at

the time when the plaintiff's right to such reparation was established (*Hart v. Ten Eyck*, 2 Johns. Ch. 117; *Peabody v. Tarbell*, 2 Cush. 227, 233; *May v. Le Claire*, 11 Wall. 236, 237)."

In that case, as in this, the only cause of action alleged or proved was the right to redeem; but as the premises had been wrongfully conveyed, the plaintiff, upon establishing such right, was awarded compensation on the basis of value at the time of the trial. Compensation was allowed as an equitable substitute for actual redemption. In other words, the land which should have been conveyed was appraised by the court, and the defendant compelled to restore the amount of the appraisal, as the only method of redemption possible. The form of relief granted was a money judgment, but that was possible only because a right to redeem had been established, for without that right the relief would be limited to the proceeds of the sale (*Baily v. Hornthal*, 154 N. Y. 648, 661). So in the case at bar, the plaintiff established the same right, but the defendant showed that he had placed it beyond his power to reconvey. Thereupon in rebuttal and not as a part of her cause of action, the plaintiff had the right to prove the present value of the land, so as to follow the money presumed to be in the defendant's hands, and redeem that which he had wrongfully substituted for the land, the same as if it were in fact land. Guided by the cardinal principle that the wrongdoer shall make nothing from his wrong, equity so moulds and applies its plastic remedies as to force from him the most complete restitution which his wrongful act will permit (*May v. Le Claire*, 78 U. S. 217; *Van Dusen v. Worrell*, 4 Abb. Ct. App. Dec. 473; *Miller v. McGuckin*, 15 Abb. [N. C.] 204; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Enos v. Sutherland*, 11 Mich. 538, 542; *Budd v. Van Orden*, 33 N. J. Eq. 143; s. c., *id.* 564). When he cannot restore the land it will compel him to restore that which stands in his hands for the land, and will not permit him to assert that it is not land when the assertion would be profitable to himself but unjust to the one whom he wronged. He cannot escape by offering to pay what he received on selling the lands, but must pay the value at the time of the trial. He cannot cut off the right of redemption and convert it into a personal liability, for he is still a mortgagee, and subject as such to the mortgagor's rights. The fact that the injured mortgagor need not take the proceeds of the sale, but may insist on the proved value of the land, as well as the pleadings and proofs, show that this is a pure action to redeem, and must be so regarded for all purposes, including the defense of the Statute of Limitations. While the mortgagor is helpless as against his grantee, she is not helpless as against him.

The defendants insist that as the plaintiff can only recover a

money judgment, the cause of action is in the nature of an accounting for money had and received, and hence that the six-year, or at most the ten-year Statute of Limitations is a bar. This is not an action, however, to recover money, but to redeem land from a mortgage, and but for the misconduct of the defendant would have resulted simply in a judgment of redemption, with an accounting for the rents and profits of the land, after payment of the debt by the plaintiff, according to her demand and offer before the commencement of the action. The period of limitation provided by the Code, within which an action to redeem from a mortgage may be maintained, is twenty years after breach of the condition or the non-fulfillment of the covenant therein contained (Code Civ. Pro., § 379). So far as the defendants are concerned, the plaintiff had a right to redeem. * She brought her action to redeem and established it by evidence, and was entitled to judgment accordingly; but as that judgment would be ineffectual because the mortgagee had sold the land, equity will simply vary its relief from a judgment of redemption in land to a judgment of redemption in money representing the land. If the plaintiff had not elected to redeem, but to sue for money had and received to her use, the case of *Mills v. Mills*, 115 N. Y. 80, relied upon by the defendants, might be an authority. In that case, however, as was stated by this court, "all the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem." The relief demanded, as appears from the appeal book on file in this court, was simply a judgment "for all moneys received by" the defendant. No claim was made that the two transactions, which were four years apart, constituted a mortgage, or that there was ever a right to redeem. The theory of the action was that the defendant lawfully sold the land and should account for the proceeds, after deducting his own claim. Thus, the court said: "Absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself, and pay over any surplus to his brother." The fundamental fact that the defendant sold without right was wanting in that case, and hence the principle, which is the basis of our judgment, could not be applied. It is the wrongful conveyance by the mortgagee in possession, under a deed absolute on its face, that enables a court of equity to hold on to the case after ordinary redemption has been shown to be impossible, and to allow such a redemption against the wrongdoer as will prevent him from gaining by his wrong; and will give the plaintiff her due as nearly as may be.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

PARKER, CH. J., BARTLETT, MARTIN and WERNER, JJ., concur;
GRAY, J., not voting; CULLEN, J., not sitting.

*Judgment reversed, etc.*¹

¹“That the deed under which defendant held the land, although absolute in form, was a mortgage, admits of no doubt. . . . The original character of the transaction was in no manner changed by the renewal of the note for the balance and by accepting a new agreement as to making a deed on payment of the sum to become due, notwithstanding it contained a clause declaring time of payment material and of the essence of the contract, and in case of failure the ‘intervention of equity is forever barred.’ The relation of mortgagor and mortgagee still continued.”—*Per* Scott, J., in *Tennery v. Nicholson*, 87 Ill. 464 (1877). Accord. are *Clark v. Henry*, 2 Cowen (N. Y.), 324 (1823); *Stover v. Bounds*, 1 Oh. St. 107 (1853); *Bearss v. Ford*, 108 Ill. 16 (1883); *Parmer v. Parmer*, 74 Ala. 285 (1883); *Turpie v. Lowe*, 114 Ind. 37 (1887), and the authorities generally.

CHAPTER II. (*Continued*).

SECTION II. RELEASE OF THE EQUITY OF REDEMPTION.

TRULL v. SKINNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1835.

(17 *Pick.* 213.)

SHAW, C. J., delivered the opinion of the court. The plaintiff has brought his bill in equity to redeem certain mortgaged premises therein described, being parcels of real estate situated in Cambridge. He claims title as the purchaser of an equity of redemption at an officer's sale, made pursuant to the statutes providing for the seizure and sale of equities of redemption for satisfying executions. The sale to the plaintiff was made on May 4, 1833, for \$3500 on an execution and judgment recovered by Ezra Trull against Royal Makepeace, in a suit in which the premises had been attached on mesne process the 11th of April, 1832. The question therefore is, whether Makepeace had such an equity of redemption, liable to be taken by creditors, either in May, 1833, when it was taken in execution, or in April, 1832, when it was attached.

There is no doubt that the transaction of September, 1827, constituted a mortgage. Makepeace conveyed to Skinner & Hurd an estate in fee, consisting of sundry parcels of land; and at the same time an indenture, bearing the same date, was entered into by the parties, reciting the conveyance, reciting that a debt was due from Makepeace to Skinner & Hurd, and containing an agreement that Skinner & Hurd should purchase in the equity of redemption, then about to be sold on execution, should pay off a mortgage due to Dr. Shattuck, should advance further sums of money, and, upon repayment of the sums due to them, should release and reassign to Makepeace. It was further agreed that Makepeace might make sales of the lands from time to time, that Skinner & Hurd would execute releases pursuant to such sales, that they should receive the money, the proceeds of such sales, and apply it to the payment of the debt, and should account for the surplus; and the whole was to be accomplished in three years.

Some small sales were made pursuant to this agreement, and in April, 1831, a large part of the debt remaining unpaid, a new arrangement was made, also by indenture. The instrument of

defeasance, before held by Makepeace, was surrendered and delivered up to be cancelled, and new stipulations were entered into, by which Skinner & Hurd leased the land to Makepeace for two years, at a rent about equal to the interest on the debt; and they further stipulated that, upon the payment of a certain sum by Makepeace in two years, they would convey the estate to him.

The first question is whether this last agreement, surrendering and cancelling the instrument of defeasance, was an extinguishment of the equity of redemption, as between the parties, and against the creditors of the mortgager. The court are of opinion that where an absolute deed is given, accompanied by a simultaneous instrument operating by way of defeasance, and afterwards the parties, by fair mutual stipulations, agree that the defeasance shall be surrendered and cancelled, with an intent to vest the estate unconditionally in the grantee by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee. The original conveyance stands unaffected in form and legal effect; it conveys an estate in fee; the only party who could even claim a right to deny it that operation, by engrafting a condition upon it, has voluntarily surrendered the only legal evidence by which that claim could be supported, and is thereby estopped from setting it up. Such cancellation does not operate by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence, by which alone the claim could be supported: like the cancellation of an unregistered deed and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet taken together such cancellation and conveyance to a third person make a good title to the latter by operation of law. It gives a seisin *de facto*, a conveyance by deed duly registered being to many purposes equivalent to livery of seisin (*Higbee v. Rice*, 5 Mass. R. 352). It is good against the grantor and his heirs by force of the second deed, and it is good against the first grantee and all claiming under him, by force of the registry acts (*Commonwealth v. Dudley*, 10 Mass. R. 403). But the point now decided, of the effect of cancelling an instrument of defeasance, seems to be settled by authorities (*Harrison v. Phillips Academy*, 12 Mass. R. 456; *Rice v. Rice*, 4 Pick. 349). But this rule is to be taken with this qualification, that the transaction is conducted with perfect fairness and good faith, both as between the parties and as against the creditors of the mortgager, and that the rights of third persons had not intervened before the completion of the transfer by the cancellation. But if these qualifications do exist, if no unfair advantage is taken of the mortgager, if by mutual agreement all beneficial and available interest of the mortgager is

taken away, in a form which must forever prevent him from enforcing a right to redeem by any legal or equitable proceeding, there seems to be no interest which the creditor of such party can take for the satisfaction of his claims.

2. The court are also of opinion that the agreement by Skinner & Hurd to convey upon certain terms in two years, contained in the indenture of April, 1831, did not operate as a defeasance, so as to constitute with the original conveyance a new mortgage, because it was not executed at the same time with the conveyance of which it is claimed to be a defeasance, nor as part of one and the same transaction, nor was so understood or intended by the parties (*Kelleran v. Brown*, 4 Mass. R. 443; *Harrison v. Phillips Academy*, 12 Mass. R. 456).

Perhaps where parties by mutual agreement, intending to enlarge and extend the time of redemption, should take up an existing instrument of defeasance and at the same time execute another, connected with the former by proper recitals and provisions, showing an intention to continue the former right of redemption on foot, in a modified form, by force of this substituted instrument of defeasance, such new instrument might be so construed as to relate back to the first deed and preserve the mortgage, when such construction would but support and carry into effect the intent of the parties; of this, however, it is unnecessary to express an opinion. The instrument now relied on as a defeasance was not only not made at the same time the original deed was executed, nor at the time it took effect, nor was it either actually or constructively part of the same transaction, nor was it a case where the parties recognised it as a mortgage, or intended to construe or carry it into effect as such. The court are, therefore, of opinion that by the surrender of the defeasance the right in equity was extinguished, the original mortgage remained seised by force of the first deed, and the new contract did not constitute a new mortgage, nor keep the existing equity of redemption in force.

3. This leads to the remaining, and perhaps to the parties the most important question, whether this surrender of the defeasance and extinguishment of the equity was good against the creditors of Makepeace. This depends mainly on the questions of fact, to which much evidence was taken, whether this arrangement was made with an intent to delay, defeat or defraud the creditors of Makepeace; whether there was a secret trust on the part of the respondents to hold the same, in whole or in part, for the benefit of the mortgagor; and whether there was such a disparity between the value of the estate and the amount for which it was taken as to lead to a reasonable inference of any such fraudulent intent.

(After an examination and summing up of the evidence:)

Upon the whole evidence the court are of opinion that the transaction was not fraudulent, that the equity of redemption was relinquished before the attachment, and that the complainant did not acquire a right to redeem under the officer's deed.

Bill dismissed.

GREEN v. BUTLER.

SUPREME COURT OF CALIFORNIA, 1864.

(26 Cal. 595.)

Appeal from the District Court, Twelfth Judicial District, city and county of San Francisco.

This action was brought to compel an accounting and a reconveyance of the property. Plaintiff claimed that the deed and defeasance constituted a mortgage, and that Leavitt, unknown to plaintiff, had paid Butler a large portion of the sum mentioned in the defeasance before the execution of the same, and that the amount thus paid by Leavitt, and the proceeds of the property received by Butler as mortgagee in possession, had satisfied the mortgage, and that Leavitt and Butler had combined together to defraud plaintiff.

The other facts are stated in the opinion of the court.

By the court, SAWYER, J. A large portion of the briefs on both sides is devoted to a discussion of the evidence. But no appeal has been taken from the order denying a new trial, and the parties must be presumed to have been satisfied with the facts as found. Whether they were or not, the appeal is from the judgment alone, and, on such appeal, we cannot review the evidence. The practice is the same in all cases, whether at law or in equity (*Allen v. Fennon*, 27 Cal. 68). Whatever doubt there might formerly have been on this point as to cases in equity, there can be none since the passage of the Act of 1861, the first section of which provides "that no distinction as to the mode of taking or perfecting appeals, or as to the effect of them, shall be made between cases at law and cases in equity, but the provisions of the Practice Act shall apply in like manner to all cases of appeal" (Laws 1861, p. 589). Nor did the parties, when the appeal was taken, seem to contemplate that we should re-examine the evidence. It is stipulated that certain papers on file shall constitute the statement on appeal (there does not appear to have been any statement on motion for new trial), and the grounds of appeal specified in the statement are, substantially, that the referee erred in his conclusions of law, and, as a consequence, that the judgment is erro-

neous. No error as to the facts found is alleged in the statement as a ground of appeal.

The referee finds, among other facts, that prior to the 14th of August, 1854, the plaintiff was in possession of the lands described in the complaint; that on that day, for a valuable consideration, he conveyed the said lands and improvements thereon by a deed absolute on its face to the defendant Butler; that although the deed was absolute on its face, it was intended as a mortgage to secure to said defendants certain moneys, due and to grow due, for erecting buildings and improvements thereon for a firm composed of plaintiff and defendant Leavitt; that on the 20th of October, 1854, the said firm of Green & Leavitt had an accounting with defendant Butler, and that upon said accounting it was found and agreed by all parties that said firm was indebted to said Butler for constructing said improvements in the sum of eight thousand five hundred dollars; that on said 20th day of October said Butler executed and delivered to said Green & Leavitt a written defeasance, whereby he bound himself, upon the payment by them to him on or before March 1, 1855, the said sum of eight thousand five hundred dollars, to convey by quit-claim to said Green & Leavitt the said premises, and covenanted in said defeasance that if, after said 1st day of March, he should sell said premises, he would pay over to said parties any surplus that might arise over his debt and costs; that said defendant Butler on the 1st of February, 1855, with the consent of said plaintiff and said defendant Leavitt, entered into possession of said premises and continued in possession till the 27th day of February, 1855.

"That on the said 27th day of February, A.D. 1855, at said city and county, the said plaintiff and the said defendant, Joseph E. Butler, had an accounting and settlement of and concerning the said plaintiff's interest in and to the land described in said complaint, and the improvements then thereon, and of the furniture then in said 'Ocean House;' on which accounting and settlement the said defendant, Joseph E. Butler, paid to the said plaintiff the sum of two thousand dollars, in four promissory notes, for said plaintiff's interest in and to said land and the improvements thereon, and the furniture then in said house, which said notes were subsequently paid; and the said plaintiff then and there, in consideration of said sum of two thousand dollars, surrendered the said written defeasance to the said defendant, Joseph E. Butler, for cancellation, and the same was thereby cancelled as against the said plaintiff."

The only question arising on the record is as to the effect upon the rights of the parties as to the relief sought in this action, of the surrender of the defeasance to be cancelled, under the agreement

found by the referee. The principles stated in the numerous cases cited by appellant's counsel are generally admitted to be correct. But there can be no doubt that a mortgagee can make a *bona fide* purchase of the equity of redemption—if, indeed, we may use these terms in the present condition of the law as to mortgages in this State—and thereby acquire an absolute title. The principle is well stated in *Remsen v. Hay*, 2 Edw. Ch. 535, in the following terms: "There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership by purchase from the mortgagor at any time subsequent to the taking of the mortgage, and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealings between the mortgagor and mortgagee to extinguish the equity of redemption; but if it be fair and honest on the part of the mortgagee, the purchase will not be disturbed. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed, or of some covenant or agreement forming part of the same transaction with the loan and the taking of the security, by which he shall attempt upon the happening of some future event or contingency to render the estate irredeemable and obtain an absolute ownership. In such cases the maxim applies of 'Once a mortgage, always a mortgage' (*Henry v. Davis*, 7 John. Ch. 40; *Clark v. Henry*, 2 Cow. 332). But it cannot interfere with the right to foreclose when the mortgage has become forfeited, nor with any fresh contract which the mortgagor may choose to make with the mortgagee for a sale or relinquishment of the equity of redemption and vesting the latter with an irredeemable estate." There are numerous authorities to the same effect (1 Wash. Real Prop., p. 496, §§ 23, 24; *Dougherty v. McColgan*, 6 Gill. & J. 275; *Russell v. Southard*, 12 How. 154; *Adams v. McKenzie*, 18 Ala. 698).

Independent of authority, no argument is necessary to show that, upon principle, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged property that he has in respect to any other property. Nor has section two hundred and sixty of the Practice Act, or any of the former decisions in this State relating to mortgages, placed any restriction upon the authority of the mortgagor to make other and further contracts affecting his title to the land subsequent to the execution of the mortgage. The language of Mr. Justice Field in *McMillan v. Richards*, 9 Cal. 365, cited by counsel, that "the owner of a mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance," must be limited to the question then under discussion. He was simply endeavoring to show that no title passed by the mortgage alone, either before or after default, or could be acquired under it

by strict foreclosure or in any other manner than by a sale under a decree of a court, and that in such case the title did not vest till consummated by a conveyance after the period for redemption had expired. He had no reference to a contract affecting the title, made by the mortgagor himself subsequent to the making of the mortgage. Reference was only made to the possibility of acquiring title through the mortgage, independent of any further action on the part of the mortgagor.

In this case, according to the finding of the referee, there was a settlement between the plaintiff and defendant Butler, by which the said Butler paid to plaintiff for his interest in the lands and improvements in dispute and the furniture in the Ocean House, situated on the premises, the sum of two thousand dollars, and the plaintiff, in consideration thereof, surrendered the defeasance to defendant Butler "for cancellation, and the same was thereby cancelled as against the said plaintiff." According to the finding, the sum of eight thousand five hundred dollars was secured on the premises, which premises on said 27th of February, 1855, were only worth seven thousand five hundred dollars.

The referee found that there was no fraud in any of the particulars charged in the complaint, and the finding in respect to the charges of fraud are sufficiently specific, as it negatives every allegation of fraud.

He does not say in so many words in his finding that the mortgage debt remained unpaid; but it is the necessary result of the findings that such was the case, and that the full amount was due. If we were permitted to re-examine the evidence in the record, we are not prepared to say he erred. The parties, at the time of the execution of the defeasance, struck a balance themselves, and the evidence to disturb their own settlement is exceedingly loose and unsatisfactory.

The surrender of the defeasance to be cancelled with an intent to vest the entire estate in Butler did not in law convert the mortgage into a deed or operate as a conveyance of Green's title to Butler. Whether it operated by way of estoppel in equity to vest the title in Butler or not, it is not now necessary to determine. The deed to Butler being absolute on its face, the title upon the record is apparently in him. The plaintiff seeks the aid of a court of equity to compel a conveyance of the land in controversy on the ground that the conveyance to Butler was a mortgage, and that the mortgage has been satisfied. The defendant Butler contests the claim and shows that instead of the mortgage being satisfied he had paid the full value of the premises with the understanding that he had purchased the plaintiff's interest, and that the defeasance was surrendered to be cancelled in pursuance of the agreement between the parties. Butler afterward continued in possession as owner.

If Butler did not obtain the title in law, he paid for it its full value, and supposed the title to be vested in him by the surrender and cancellation of the defeasance with the intention of so vesting it. The surrender of the defeasance to Butler to be cancelled, and the retention of it by him, is in law a cancellation of that instrument, though not actually destroyed.

A court of equity will not aid plaintiff to obtain a conveyance, under the circumstances of this case, in direct violation of his own agreement and in fraud of the rights of defendant Butler.

Upon the allegations of the plaintiff's complaint, it is at least extremely doubtful whether the conveyance to Butler can be regarded as a mortgage at all. The distinct allegations of the complaint are, not that the land was conveyed by plaintiff to secure the amount due Butler, but that Butler represented that there were certain mechanics' liens on the Ocean House which the claimants were pressing and threatening to foreclose; that "said Butler was unable to procure the money from his own means to satisfy the said demands, and could not procure the money for that purpose, unless the said plaintiff would convey to the said Butler the said twenty-five acres of land, in order that the said Butler might mortgage the said land and buildings to procure the necessary funds; and that the said plaintiff, confiding, etc., did, on the said 14th day of August, 1854, make, execute and deliver to the said Butler a deed of the said twenty-five acres of land for the purpose aforesaid, and not absolutely, nor for any other purpose," and plaintiff's counsel contends that the testimony really established these very allegations, and nothing more, with respect to the object of the conveyance at the time; and if we could look at the testimony, it does seem to tend strongly in that direction. Now if this was the only object of the conveyance at the time it was made, it certainly was not at that time in any sense a mortgage. It was a conveyance of the title to Butler, not to secure his demand, but to enable Butler to mortgage it to raise money to pay off the liens of the mechanics. And such a conveyance certainly passed the fee at the time. True, Butler would have held the legal title in trust for plaintiff, but upon what principle can it be said that afterwards, in October following, the execution of the instrument, which has been called a defeasance—an entirely distinct transaction—transmuted the original conveyance in fee into a mortgage? In *Trull v. Skinner*, 17 Pick. 216, it was held that where a deed was executed and at a subsequent time a defeasance was also executed, the deed and defeasance subsequently executed did not together constitute a mortgage, because the defeasance was not executed at the same time with the deed, and was not a part of one and the same transaction. From the execution of the instrument called a defeasance and the facts found by the

referee it is evident that the parties, at the time of the execution of the defeasance, intended to make the two instruments serve the purpose of a mortgage, whatever the legal effect of the transactions might be, as they also intended to vest full title in Butler by the subsequent surrender of the defeasance. The referee found the transaction to be a mortgage, contrary, perhaps, to these allegations of the complaint, and against the protest of the plaintiff. If not a mortgage, the legal title is certainly in the defendant Butler.

But it is not necessary to determine whether upon the facts alleged in the complaint the two instruments in law constituted a mortgage or not; for in either view, taken in connection with the other findings, we think the plaintiff is not entitled to any relief upon the case made by the record.

*The judgment is therefore affirmed.*¹

VILLA v. RODRIGUEZ.

SUPREME COURT OF THE UNITED STATES, 1870.

(12 Wall. 323.)

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the District of California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant Rodriguez claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

¹ *Vennum v. Babcock*, 13 Ia. 194 (1862); *West v. Reed*, 55 Ill. 242 (1870); *Show v. Walbridge*, 33 Oh. St. 1 (1877); *Bazemore v. Mullins*, 52 Ark. 207 (1889), *accord*. *Jones v. Blake*, 33 Minn. 362 (1885), *contra*.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That proportion is his if his title be valid.

The widow is the sister of the defendant Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez for money then borrowed a note for four thousand dollars, payable a year from date and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision that in default of the payment of the interest as stipulated the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt; and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid \$1172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about \$10,000. On the 17th of February, 1865, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was \$100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase

by paying him \$25,000 in gold, and upon such payment being so made, he covenanted that he would, by a sufficient deed, release and quit-claim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencio.

The lessees and their assignees insist that they are *bona fide* purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase-money fully paid (*Nace v. Boyer*, 30 Pennsylvania, 110; *Boone v. Chiles*, 10 Peters, 177, 211). The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor (*Crocoll v. Shererd*, 5 Wallace, 289).

This contract calls for a quit-claim deed. The result would be the same if such a deed had been executed and full payment made without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection (*May v. Le Claire*, 11 *id.* 232; *Olicer v. Piatt*, 3 Howard, 363). This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt with interest, will compel him to give back that which he has taken

with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law (*Morris v. Nixon*, 1 Howard, 118; *Russell v. Southard*, 12 *id.* 139; *Wakeman v. Hazleton*, 3 Barbour's Chancery, 148; 4 Kent's Commentaries, 143; *Holmes v. Grant*, 8 Paige, 245; 3 Leading Cases in Equity, 625).

The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added “that they ought not to distrust him, as he was taking all these steps for their interest.” The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez on the same day, “which was altogether unsolicited,” says: “He stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family; while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister.” Rodriguez was examined as a witness. Referring to a period shortly preceding the execution of this deed, he says: “Afterwards I had with them further conversation, and told them, I don't wish to speculate upon you, because

you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch; but if I have bad luck and cannot sell it, I will lose my money." Elsewhere in the same deposition he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The rents, issues, and profits, and improvements made upon the premises must also be taken into the account.

The decree is reversed, and the cause will be remanded to the circuit court with directions to enter a decree and proceed

*In conformity to this opinion.*¹

¹ *Vernon v. Bethell*, 2 Eden, 110 (1761); *Pough v. Davis*, 96 U. S. 332 (1877), *accord*. Compare *Russell v. Southard*, p. 157, *supra*.

PRITCHARD v. ELTON.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1871.

(38 Conn. 434.)

Bill in equity to redeem mortgaged property; brought to the Superior Court for New Haven County, and reserved, on facts found, for advice. The facts are sufficiently stated in the opinion.

SEYMOUR, J. On the 10th of April, 1860, Elizur E. Pritchard mortgaged to John P. Elton certain premises in Wolcottville. The mortgage deed is in the usual form, with condition to be void upon payment according to its tenor of the mortgagor's note, payable four months after date, for \$6635.72. The debt was not paid according to the condition, and still remains unpaid. Mr. Pritchard died intestate and insolvent November 30th, 1860. The petitioners are his heirs at law, and they bring this bill to redeem the mortgage.

Upon all the circumstances of the case we think the petitioners **are** not entitled to relief; but it must be conceded that they have a *prima facie* case in their favor upon the face of the deeds and records. Upon the records of the town of Torrington there is a quitclaim deed of the equity of redemption from Mr. Pritchard to Mr. Elton. But it also appears that Mr. Elton refused to accept the quitclaim. On the contrary, he quitclaimed back to the heirs of Mr. Pritchard, after the latter's death, whatever interest, if any, in the premises was conveyed to him by Mr. Pritchard's quitclaim of the equity. The records of the court also show a decree of foreclosure of the equity of redemption. But to that bill for foreclosure, brought after Mr. Pritchard's death, his heirs, as such, are not parties. His administrators were made parties respondent, and, the estate being insolvent, it was probably supposed that the administrators, representing the creditors, were solely interested in the redemption. Yet it is clear that Mr. Pritchard's heirs, as such, are **not** foreclosed by that decree. The defence to this petition must, therefore, rest upon circumstances peculiar to the case, and these circumstances are such, we think, as to require us to deny the prayer of the petitioners' bill.

It appears that these premises had been mortgaged by Mr. Pritchard to one Brady, and Brady had obtained a decree of foreclosure, whereby the right to redeem would be barred on the 10th of April, 1860. On this last day of redemption, Mr. Elton, on the solicitation of Mr. Pritchard, lent the money to save the forfeiture. In consenting to make the loan and take the note and mortgage, Elton relied on Pritchard's promise that if he should fail to repay the amount lent within four months, he would, by quitclaim deed

conveying the property to Elton, save the trouble and expense of foreclosing the mortgage.

Now, if the case rested here, the right of redemption would not be lost by the mere force of this agreement and the failure by Mr. Pritchard to perform it. Courts of equity look with distrust upon all restraints on the right of redemption, and it is a familiar rule that, such agreements notwithstanding, courts of equity will in general allow the party in default to redeem. The principle on which the court in these cases grants relief is substantially the same as that on which it relieves against all penalties and forfeitures, to wit, that in general adequate compensation can be made to the party who is deprived of his forfeiture, and that the exacting of the forfeiture would be and is unconscionable.

Now, in the case under consideration, it is found that on the 5th of November, 1860, Pritchard executed in favor of Elton a quitclaim deed of the premises, and on the 9th of November caused the same to be recorded, all without Elton's knowledge; and it is further found "that although Pritchard would not have executed the deed and put it on record at the time he did, if he had not been influenced by a desire to baffle other creditors, from whom he feared trouble, he, in fact, executed the deed and put it on record in consequence of his promise, and in tardy fulfilment of it, and in good faith toward Elton." By this act Mr. Pritchard ratified and confirmed the agreement made at the time of borrowing the money, and it is apparent that Mr. Elton would have accepted the deed, were it not for the fraudulent purpose as against creditors with which he supposed it was tainted. The non-acceptance upon these grounds by Mr. Elton ought not, we think, to impair the effect of the deed as a renunciation by Mr. Pritchard of all interest in the premises. Mr. Elton, relying upon Mr. Pritchard's promise and this renunciation in pursuance of it, and upon the foreclosure which he had obtained against the administrators, in August, 1862, took possession of the property and made efforts to sell it, and, finally, in February, 1863, effected a sale to Daniel Curtiss. The committee finds that this sale was made fairly, in good faith, and at the then fair market value of the property. The sale was for \$5150. The cost of the property to Mr. Elton at that time, including interest and taxes and insurance and \$6.10 for repairs, was \$8062.66; so that his loss by means of the loan was \$2312.66. The property has since gone into several hands, has been greatly improved by building upon it, and has risen in value by the general rise in the value of property in its vicinity. Mr. Elton conveyed the property by warranty deed, doubtless supposing his title to be perfect. If the petition is granted, a considerable loss will be thrown upon his estate through the medium of the warranty deed.

Upon all these circumstances it seems to us that the usual grounds upon which courts of equity grant relief are wholly wanting in this case. There has been nothing unconscionable in the conduct of Mr. Elton. To relieve Mr. Pritchard's necessities he lent him a large sum of money, and has already in consequence been subjected to a loss of over \$2000, and Mr. Pritchard's heirs now seek to subject him to a still larger loss. It is, indeed, true that Mr. Elton might have been more thorough in seeing to it that the right to redeem was technically, as well as equitably, extinguished, either by accepting the quitclaim deed or by making the heirs of Mr. Pritchard parties to the bill to foreclose. And it is in general so easy for the mortgagee to make his title legally and technically perfect that we do not wish to establish a precedent that will encourage any neglect on the part of mortgagees to see to it that their titles are perfected in the regular and usual way. But in this case it is obvious that very slight, if any, blame can attach to Mr. Elton, and that the heirs of Mr. Pritchard, if permitted now to redeem, would do so, first, against the express contract of their ancestor in whose place they stand; second, against the renunciation by their ancestor by quitclaim deed of all right to redeem; and, third, against the equities of the case, growing out of the sale of the property made by Mr. Elton fairly and in good faith. The legal title is in the present occupants of the property under Mr. Elton's deed, and this legal title, we think, ought to prevail against the claims of the petitioners, standing as they do in the place of Mr. Pritchard, with no higher equity than he would have had if living.

The Superior Court is advised to dismiss the petition.

In this opinion the other judges concurred.¹

ODELL v. MONTROSS.

COURT OF APPEALS OF NEW YORK, 1877.

(68 N. Y. 499.)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department in favor of defendant, entered upon an order reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and directing judgment for defendant.

¹ Compare *Austin v. Bradley*, 2 Day (Conn.) 466 (1807), in which a subsequent agreement by the mortgagor to convey to the mortgagee on appraisal was held good.

This action was brought to have a deed, absolute on its face, declared a mortgage, and for an accounting and reconveyance on payment of amount due.

The court found, in substance, that in July, 1865, plaintiff, being indebted to defendant for moneys loaned and advanced, executed to said defendant a deed of the premises described in the complaint, which deed was absolute on its face and purported to convey the fee, but that it was executed as and intended as a security for the said indebtedness then existing and what might thereafter accrue; and it was agreed and intended by the parties that plaintiff, upon payment, should have the right to redeem and should be entitled to a reconveyance. That in September, 1866, defendant paid to the plaintiff at his request the sum of fifty dollars, and plaintiff then and there signed and delivered to the defendant a paper, of which the following is a copy, viz.:

“NEW YORK, Sept. 17, 1866.

“Received from William Montross fifty dollars, in full satisfaction for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date.

“THOMAS B. ODELL.”

That such payment was made and received and such receipt signed and delivered with the intention of the parties that the same should be a full settlement of all claims of plaintiff to said lands and premises and of all claims to any reconveyance thereof. As conclusions of law the court found that the deed was to be considered as a mortgage; that the payment of the fifty dollars and the receipt given therefor did not operate to change the nature of the deed from a security to an absolute conveyance, nor to release plaintiff's right to redeem, and that, upon payment of the sums due from plaintiff to defendant and the sums paid out by the latter, plaintiff was entitled to redeem; and judgment was directed adjudging that upon payment of such sums within thirty days defendant should reconvey, and in default of such payment that the premises be sold, as in foreclosure sales.

Judgment was entered accordingly.

ALLEN, J. Prior to the transaction of the seventeenth of September, 1866, when the defendant upon the payment of fifty dollars to the plaintiff took an unsealed paper signed by him acknowledging the receipt of the fifty dollars “in full satisfaction for all claims and demands whatsoever as to conveyance of property or otherwise up to this date,” the relation of the parties in respect to the land now sought to be redeemed was that of mortgagor and mortgagee.

with all the incidents of that relation (4 Kent's Com. 143). The plaintiff had conveyed the premises to the defendant by deed absolute in terms, but the conveyance was not intended as a sale, but as a security for the payment of money, and although there was no defeasance in writing, the intent could be and was shown by parol evidence, and the deed was but a mortgage. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that a defeasance has been destroyed by fraud or mistake (*Dey v. Dunham*, 2 J. Ch. R. 182; *Clark v. Henry*, 2 Cow. 324; *Marks v. Pell*, 1 J. Ch. R. 594; *Horn v. Keteltas*, 46 N. Y. 605). A conveyance absolute in terms given as a security is a mortgage with all the incidents of a mortgage, and the rights and obligations of the parties to the instrument are the same as if the deed had been subject to a defeasance expressed in the body of the instrument or executed simultaneously with it (4 Kent's Com., *supra*). It must be recorded as a mortgage and not as a deed. *Dey v. Dunham*, *supra*. This case was reversed in 15 Johnson's Reports, 555, but this principle was recognized by the appellate court that reversed the decree of the chancellor. The reversal was on the ground that the subsequent purchaser claiming adversely to the deed was not a purchaser in good faith, and so not within the protection of the recording acts (*James v. Johnson*, 6 J. Ch. R. 417; 2 Cow. 249). In *White v. Moore*, 1 Paige, 551, the chancellor held that the fact that there was no defeasance in writing did not take the instrument out of the effect of the statute requiring all mortgages to be recorded as mortgages.

The estate remaining in the mortgagor after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee and the right to redeem existed only in equity. Although a misnomer, it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy, to the lien of judgments, may be sold on execution and may be mortgaged or sold as any other estate in lands, while the mortgagee has but a lien upon the lands as a security for his debt, and the land is not liable to his debts, or subject to dower or curtesy, or any of the incidents of an estate in lands (2 Wash. R. P. 152 and *seq.*; *Jackson v. Willard*, 4 J. R. 41; *Powell on Mortgages*, 258, N. L.). The mortgagor is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon a foreclosure of the right to redeem, may ripen into an absolute title, their respective parts when united constituting one title. A mortgagor

and mortgagee may at any time after the creation of the mortgage and before foreclosure make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*; that is, when in all respects fair and for an adequate consideration (*Trull v. Skinner*, 17 Pick. 213; *Patterson v. Yeaton*, 47 Maine, 306; *Ford v. Olden*, L. R. 3 Eq. Cases, 461; *Kalldridge v. Gillespie*, 2 J. Ch. R. 30; Wash. on Real Prop., ch. 16, § 1, pl. 24).

The defendant claims to have extinguished the right of redemption and acquired the entire estate by the payment of the fifty dollars and in virtue of the written acknowledgment of its payment for the purposes named in it. The paper is in its terms ambiguous. It does not purport to convey or transfer any property or estate in lands, but is declared to be in full of all claims and demands whatsoever as to conveyance of property or otherwise. It is but a parol admission of a satisfaction for the right mentioned. The apparent meaning of the instrument is to admit a satisfaction of all claims against the defendant, claims and demands that may be enforced whether such claims are of a right to a conveyance of property or any other matter. The plaintiff required no conveyance of the lands from the defendant. Upon the payment of the mortgage debt he would have been reinvested with the unincumbered title without conveyance or release from the defendant. As evidence of his title he might have required a reconveyance or a satisfaction of the mortgage, and that the courts would have compelled. But his right of redemption was not in any sense a "claim or demand as to conveyance of property or otherwise." The receipt had, upon its face and without explanation, respect to personal claims and demands against the defendant. But the transaction was explained upon the trial and shown to have been intended as a full settlement of all claims of the plaintiff to the lands and premises and of all claims to a reconveyance thereof. If this payment and receipt did operate to change the nature of the deed from a mortgage to an absolute conveyance, and is a release of the right to redeem so that the mortgagee became seized in fee simple by a union of the estates of the mortgagor and mortgagee discharged of the mortgage, the defence to the action is perfect. It cannot be claimed that the written paper *ex proprio vigore* could have that effect. It does not profess to release the right of redemption or to convey any lands or interest in lands. No lands in particular are referred to. No agreement can be spelled out of the instrument which could be

specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. The whole force of the transaction, as affecting the rights of the plaintiff, is in the payment and receipt of the fifty dollars with intent to extinguish the title of the plaintiff. This cannot operate as an estoppel or take the case out of the statute of frauds. The mere payment of money will not entitle a purchaser to a specific performance of a parol contract for the purchase of an interest in lands. That can be repaid with interest, and no damage ensues from the non-performance of the contract. The purchaser can be made good for the use of his money, which is all that he has lost. Had the defendant, acting upon the faith of this transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same situation in which he was before, it might have estopped the plaintiff from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties. But there are none of the elements of an equitable estoppel in the case as presented by the record.

The plaintiff having a recognized legal estate in fee, he could only be divested of it (except by way of estoppel which does not exist) by some instrument which would be valid under the statute of frauds and in compliance with the statute prescribing the mode and manner of conveying lands. The statute of frauds (2 R. S. 135, § 8) is very explicit, and needs no interpretation in its application to this case. It declares that every contract for the sale of any lands or any interest in lands shall be void unless in writing and subscribed by the party by whom the sale is to be made. The whole contract, that is, the agreement to sell and the description of the lands or the interest in lands agreed to be sold, must be in writing and subscribed by the party. The other statute referred to (1 R. S. 738, § 137) is equally applicable to this case. To hold that the plaintiff had not a fee, would be to overthrow the well-established relation of mortgagor and mortgagee and reverse their respective positions in respect of the legal estate in the lands mortgaged. The statute declares that every grant in fee or of a freehold estate shall be subscribed and sealed by the person making the grant or his lawful agent. If a seal only was wanting to make the instrument relied upon by the defendant valid for the purposes intended, it is possible the court might compel the sealing, but that would not supply the intrinsic defects of the paper-writing itself.

What is said in *Stoddard v. Whiting*, 46 N. Y. 633, of the nature of the estate of a mortgagor and the bearing of the statutes quoted upon a conveyance of his estate, was not necessary to the decision of the case or necessarily adjudged by the court. The plaintiff

there, who was enforcing an equity of redemption, which was resisted, claimed under a written but unsealed assignment (a parcel writing) from the mortgagor, and that was held sufficient to give him a standing in court and enable him to maintain the equitable action to redeem. The decision is not in conflict with the views here expressed. The defendant could have acquired the estate and interest of the plaintiff either by a deed-poll, as a release or a grant, in any form sufficient in terms and mode of execution to convey an estate in lands. Mr. Powell, in his treatise on mortgages, vol. 1, p. 260, in speaking of the methods by which a mortgagee may acquire the interest of the mortgagor, says that it may be by indenture with covenants or a release by deed-poll, for by that means the estate of the mortgagor and mortgagee will become merged, and the mortgagee will be owner in fee of the whole estate.

The rights of the mortgagor and his estate can only be foreclosed by due process of law, or a release by deed in proper form, or a conveyance sufficient to pass the title to an estate in fee. The defendant has not purchased the equity of redemption or acquired the estate of the plaintiff by any proper release or conveyance. No injustice will be done the defendant by the result to which this conclusion leads. He will receive his money and interest, and will be fully indemnified, and he is not entitled to speculate in his dealings with his mortgage-debtor.

The judgment of the Special Term might have directed a redemption, upon the proper terms, within a specified time, or in default thereof the plaintiff be foreclosed. That, I think, would have been the proper judgment. But as no fault is found with the terms of the judgment at Special Term, the judgment of the General Term should be reversed and that of the Special Term affirmed.

All concur, except RAPALLO, J., not voting.

Judgment accordingly.

DE MARTIN v. PHELAN.

SUPREME COURT OF CALIFORNIA, 1897.

(115 Cal. 538.)

Appeal from a judgment of the Superior Court of the city and county of San Francisco. James V. Coffey, Judge.

The facts are stated in the opinion of the court.

TEMPLE, J. This appeal is from a judgment upon demurror

to the complaint. The complaint contains averments to the effect that on the fourth day of November, A.D. 1881, plaintiff owned a certain tract of land which was then subject to mortgage liens, then owned by James Phelan. The amount due on said mortgages was \$196,000. The real estate was worth \$390,375. The plaintiff and her thirteen children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition, and also that her equity of redemption was worth at least \$45,500. Still, designing to take advantage of her distress and necessities, he first offered her \$4000, and then \$10,000, and finally \$19,000 for her equity of redemption. The offers were successively made on different days; and in the meantime, said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value by taking an oppressive and unfair advantage of her necessities and distress.

Also that on the fourth day of November, 1881, decedent made her the offer of \$19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities, she finally did accept said offer, and conveyed her equity to him for said sum. She did not know that decedent had taken such advantage, or that he knew of her necessities and distress at that time, but that she discovered such fact on the twenty-seventh day of December, 1887.

It is averred that when defendant falsely represented that he would sell said property unless she accepted \$19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same unless he was unable to procure plaintiff's interest for \$45,500. He fully intended to offer her \$45,500 for her equity, if he could not procure it for less. This intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious.

The facts constituting the supposed fraud are: 1. Plaintiff was without available means and in great financial distress; 2. Decedent had obtained a judgment foreclosing mortgage liens upon her land, amounting to \$196,000. Her land was worth much more than this; but owing to a temporary stringency in the money market, she

could not borrow more money upon the land or sell it for more than the mortgage debt; 3. Decedent knew that her equity of redemption was worth \$45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value and his willingness to pay that sum, provided she would not take less; 4. He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed, in the meantime making her successive offers for her equity of \$4000, \$6000, \$10,000, and \$19,000, which last offer she accepted, in ignorance that deceased would have given her more had she insisted upon it, and induced by her necessities and fears of losing her property in case of a sale under the decree.

It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan to conceal from her the fact that he intended to offer her as much as \$45,500 for her equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her necessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel.

The real point in the case is, I presume, that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression: and it is maintained that it was oppression on the part of Phelan to get the property for an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law the mortgagee, at least after condition broken, was the legal owner and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was

threatened with a sale under the decree if she did not sell. Of course she knew without being told that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another or to prevent the obtaining of a loan.

I can discover no element of fraud, oppression, or unfairness in the case.¹

The judgment is affirmed.

HENSHAW, J., and MCFARLAND, J., concurred.

¹ Compare *West v. Reed*, 55 Ill. 242 (1870).

CHAPTER II. (*Continued*).

SECTION III. AGREEMENTS FOR COLLATERAL ADVANTAGE.

WILLETT v. WINNELL.

HIGH COURT OF CHANCERY. 1687.

(1 Vern. 488.)

The plaintiff was the youngest son of his father, who was seised, according to the custom of the manor of Wolverly, of a copyhold tenement of the nature of Borough English of the value of £15 per annum: and in April, 1671, the plaintiff's father, having borrowed £200 of the defendant's father, for securing the same made a conditional surrender into the hands of two customary tenants of the manor, to be void on payment of the £200 and interest in April, 1672; and at the same time the defendant's father entered into a bond, conditioned that if the £200 and interest should not be paid at the day, then if the defendant's father should pay to the plaintiff's father, his executors, administrators or assigns, the further sum of £78 in full for the purchase of the premises within ten days afterwards, that the bond should be void, or otherwise stand in full force.

The plaintiff's father died in November, 1671, before the mortgage was forfeited, leaving the plaintiff an infant of two years old; and the £200 with interest not being paid at the day, the defendant pays the £78 the next day after the mortgage was forfeited, to the administrator of the plaintiff's father, according to the condition of the bond.

The plaintiff's bill was to redeem, on repayment of the £200 with interest, discounting the profits. The defendant by answer insisted it was an absolute purchase.

THE COURT decreed a redemption, making no doubt but it continued a mortgage, and was not an absolute purchase: but as to the £78 declared that to be well paid to the administrator, and therefore ordered the whole moneys, with interest, to be repaid and costs, discounting the mesne profits.

JENNINGS v. WARD.

HIGH COURT OF CHANCERY, 1705.

(2 *Vern.* 520.)

The defendant Ward lends money to Neale, the groom porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure sixteen thousand pounds with interest at £6 per cent., and in another deed, executed at the same time, took a covenant from Neale that he should convey to the defendant, if he thought fit, ground rents to the value of sixteen thousand pounds, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement; but the MASTER OF THE ROLLS [SIR J. TREVOR] decreed a redemption, on payment of principal, interest and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

ORBY v. TRIGG.

HIGH COURT OF CHANCERY, 1822.

(9 *Mod. Rep.* 2.)

The brother of the now plaintiff mortgaged his lands to the defendant, and afterwards died. In the deed of mortgage there was a covenant to reconvey upon six months' notice of the payment of the principal sum and interest; and another covenant that, in case the estate was to be sold, the mortgagee should have the pre-emption. After the death of the brother, who was the mortgagor, his widow delivered up the counterpart of the mortgage to the attorney of the mortgagee.

The plaintiff having given the defendant six months' notice that he would pay the principal and interest, and having it ready to pay, the defendant refused to accept it. The plaintiff thereupon exhibited his bill for a reconveyance of the estate, having entered into articles with a purchaser for the sale thereof. The defendant, by his answer, insisted on the covenant in the deed to have the pre-emption.

But it appearing that neither the plaintiff nor the purchaser knew anything of this covenant, for that the counterpart of the mortgage

was delivered up as aforesaid; and that the plaintiff had often made application to the mortgagee for a copy thereof, which was as often denied, he insisting only to have the principal and interest paid, for that the security was too narrow for the money which he had lent; and that if it was not paid by such a time, he would foreclose the equity of redemption, but never mentioned that he was to have the benefit of pre-emption until after the estate was sold; therefore he ought not now to claim it, to the prejudice of the purchaser and of the plaintiff, having so long time for that purpose before the estate was sold.

And it was decreed accordingly, and the mortgagee to reconvey upon payment of the principal and interest, &c.

IN RE EDWARDS' ESTATE.

LANDED ESTATES COURT IN IRELAND, 1861.

(11 *Ir. Ch.* 367.)

The question in this case was raised on a motion by the petitioner to make the conditional order for sale previously granted by the court absolute. Cause was shown against making the order absolute by P. W. Jackson, a mortgagee on the estate. Jackson grounded his opposition on his deed of mortgage, dated the 3rd of May, 1859. This deed contained a proviso that Jackson would not call in the sum secured (£2500) until two years had elapsed or twelve months' interest had accrued due; and "that in case one full year's interest on said principal sum of £2500 shall become due and be unpaid at any time during the said period of two years, or in case the John K. Edwards shall, at the expiration of the said period of two years, be unable to redeem the mortgaged premises, it shall and may be lawful for the said Peter W. Jackson, his executors, administrators, or assigns, if he or they should so elect or prefer, to purchase for his or their own use and benefit; and the said J. K. Edwards doth hereby for himself, his heirs and assigns, promise and agree to sell and absolutely convey, by all necessary deeds and assurances in the law, to the said P. W. Jackson, his heirs and assigns," the part of the mortgaged premises called Old Court for such sum as with the sum of £2500 and interest then due thereon would make £1000. Jackson now, relying on this agreement, contended that Edwards was bound to complete the conveyance of Old Court to him.

Mr. R. R. Warren appeared for the owner and the petitioner

Mr. Brereton appeared for the objector, P. W. Jackson.

Mr. Warren. The cause alleged is a proviso or condition of forfeiture of the mortgagor's equity of redemption contained in the deed of mortgage itself. This condition is void, for it is inconsistent with the doctrine "once a mortgage, always a mortgage." The very terms of the proviso are that, in default of redemption in two years, the right to redeem should be lost forever, and the mortgagor obliged to sell to the mortgagee out and out. Even if the condition were good in law, it is gone; for it is not shown that the mortgagor was unable to redeem on the day named; and on that day the mortgagee should have elected to take advantage of the condition. The case is like a condition of re-entry at common law for non-payment of rent, when demand must be strictly made.

Reference was made to the cases collected at Sec. 1019 of Story's *Eq. Jur.* and Coote on Mortgages, p. 14; Cruise's Dig., tit. Mortgage, p. 71, 4th ed.; *Jennings v. Ward*, 2 Vern. 520; *Willet v. Winnell*, 1 Vern. 488.

HARGREAVE, J. I have no doubt that this agreement on the part of Mr. Edwards to sell the Old Court estate for £4000 in the event of his not being able to redeem the mortgage on the 4th of December, 1860, is totally void, and ought to be disregarded by a court of equity.

The rule of equity is that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage. I do not doubt that if this contract had been entered into by Mr. Edwards with Mr. Jackson, after the completion of the mortgage transaction, and when Mr. Edwards had got the money in his pocket, it would be perfectly valid; but then the mortgagor would be under no kind of pressure, and he would be able to exercise his unbiassed judgment as to whether it was a fair contract. But when the contract is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced.

If the land had fallen in value below £4000, Mr. Jackson would have insisted on being treated as a mortgagee; but as it has risen he says he is a purchaser—that is, he gets a collateral benefit over and above his principal and interest, which a court of equity never permits.

This contract is virtually a clause of foreclosure on a fixed day; and even in England, where foreclosure is possible, it only takes place after a bill has been filed for the purpose, and after the mortgagor has had one or more days fixed for paying the debt.

BROAD v. SELFE.

COURT OF CHANCERY, 1863.

(11 *Weekly Rep.* 1036.)

This was a foreclosure suit. The plaintiffs prayed an account of what was due to them for principal moneys and interest, commission and expenses, under the agreement hereinafter set forth; payment by the defendant of the amount so to be found due, or, in default, foreclosure.

It appeared that in June, 1861, the plaintiffs lent to the defendant £200 on his promissory note, which was due in the September following, but was dishonored. On the 30th of September, 1861, the defendant gave to the plaintiffs a new promissory note for the same amount, and also signed a Memorandum of Agreement, as follows:

"Memorandum of Agreement made this 30th day of September, 1861, between Peter Broad and Taylor Pritchard, of 28 Poultry, in the city of London, auctioneers, and John Selfe, of Surbiton Hill, in the county of Surrey. Whereas, in consideration of the said Peter Broad and Taylor Pritchard advancing to the said John Selfe the sum of £200 upon the security of a piece or parcel of land known as 'The Park,' Surbiton Hill, &c., the said John Selfe hereby authorizes and instructs the said Peter Broad and Taylor Pritchard to sell and dispose of the whole or any portion of the land as above named, either by private or public sale, at and for the best price that can be obtained; and further, to repay themselves out of the proceeds of such sale the said sum of £200, with interest at the rate of 5 per cent. per annum from the date hereof, with a commission of 5 per cent. on the amount realized, and the expenses attending the sale thereof; and in the event of the said John Selfe repaying the said Peter Broad and Taylor Pritchard the aforesaid sum of £200 and interest, the said John Selfe shall pay to the said Peter Broad and Taylor Pritchard a commission of 5 per cent. on the value of the said property, together with all the expenses incurred by them, whether the property or any portion thereof is sold by any other agency or retained by the said John Selfe. The said John Selfe further undertakes to execute a legal mortgage of the above-mentioned lands and buildings to the said Peter Broad and Taylor Pritchard at his own expense whenever called upon by them so to do, such mortgage to contain all the usual and customary covenants, and particularly power of sale, either by private contract or public auction."

The plaintiffs, in pursuance of the authority given to them by the agreement, made all the necessary arrangements for proceeding to a sale of the premises mentioned in the Memorandum, and in so doing

incurred considerable expense ; but in February, 1862, the defendant gave the plaintiffs notice that he revoked the authority so given, and the premises were accordingly not sold. The value of the property was about £8,000. The plaintiffs applied to the defendant for payment of the principal, interest, and 5 per cent. commission (£400), and expenses, which they alleged to be due to them ; but the defendant declined to recognise their claim to the 5 per cent. commission, and in March, 1862, the defendant tendered to the plaintiffs the sum of £200 and interest, and £15 for any expenses the plaintiffs might have incurred in the matter.

The present suit was afterwards instituted, and the cause now came on upon motion for decree.

T. A. Roberts, for the defendant, contended (1) that the plaintiffs were not entitled to charge in the foreclosure suit a commission of 5 per cent. upon the value of the property in addition to the principal, interest, and costs due in respect of the mortgage security. It was a principle of the Court that a mortgagee should not be allowed any collateral advantage beyond his mortgage security. A mortgagee could not stipulate to be a receiver of the mortgage property at a salary : *Chambers v. Goldwin*, 9 Ves. 271 ; *Coote on Mortgages*, 21, 391, 444 ; *Webb v. Rorke*, 2 Sch. & Lef. 661 ; *Langstaffe v. Fenwick*, 10 Ves. 405 ; *Leith v. Irvine*, 1 My. & K. 277 ; *Jennings v. Ward*, 2 Vern. 520 ; *Edmunds v. Povey*, 1 Vern. 188 ; *Fisher on Mortgages*, 300 ; *Matthison v. Clarke*, 3 Drew, 3 ; 3 W. R. 2. (2) This was, in effect, a suit for specific performance of the contract ; and as there was no mutuality between the parties, the Court could not enforce it.

Cole, Q. C., in reply.

The MASTER OF THE ROLLS [LORD ROMILLY] said the contract in this case was only a contract of mortgage to the extent of £200 principal, and the interest upon it ; but not beyond this. His Honour thought that the cases referred to by Mr. Roberts, and several others which he had consulted, showed the principle that the Court would not permit a person, under the colour of a mortgage, to obtain a collateral advantage not belonging or appurtenant to the contract of mortgage. Although this principle, in its origin, probably had reference to the usury laws, it went, in his Honour's opinion, beyond them, and was not affected by their repeal. The remedies of foreclosure and redemption were co-extensive, and it was clear that if the mortgagor had come to redeem the security, he would have been allowed to do so on payment of the principal sum of £200, interest, and costs, and then his Honour would have had to consider whether, under the recent Act of Parliament, the Court could not direct an inquiry as to what was properly due to the mortgagees in respect of services rendered as to the property under the agreement entered into between them and the mortgagor. The case was the same in

foreclosure. Therefore, in making the usual foreclosure decree, his Honour proposed to direct a reference to chambers, to inquire what (if anything) was due to the plaintiffs in respect of expenses and services rendered by them under the agreement. With regard to the question of costs, generally speaking, in foreclosure suits, the mortgagee added his costs to his security; but it was equally clear that where the mortgagor had tendered his mortgage-money and interest prior to the suit, if the mortgagee came to foreclose, he must pay the costs of the suit. Here, no doubt, a tender had been made of the £200 principal and interest, and £15 for expenses, which the plaintiffs did not consider enough, and refused to accept. It was, however, to be remembered that the defendant had entered into this contract with the plaintiffs to pay them a commission with his eyes open; and, although this was a contract which the Court could not enforce by reason of want of mutuality—the Court not being able to compel the plaintiffs to perform the services required by the agreement—yet, as the defendant entered into this contract, he could not claim the same benefit from the tender which he might have done in a case of ordinary mortgage. The Court, therefore, could not give him the costs of the suit. Neither were the plaintiffs entitled to the costs of the suit, because they did not come simply to enforce a mortgage security, but they came to enforce what the Court considered they were not entitled to enforce. There would, accordingly, be no costs on either side up to the hearing. An account would be directed of what was due to the plaintiffs for the principal sum of £200 and interest at 5 per cent., and the mortgagee's costs other than the costs of the suit, with the usual foreclosure decree. An inquiry what, if anything, was due to the plaintiffs in respect of expenses incurred and services rendered in relation to the property mentioned in the Memorandum of Agreement, and further consideration on that part of the case and the future costs, would be reserved.¹

BIGGS v. HODDINOTT.

SUPREME COURT OF JUDICATURE—CHANCERY DIVISION, 1898.

(1898, 2 *Ch.* 307.)

MOTION AND ADJOURNED SUMMONS.

The plaintiff Biggs was a brewer at Cardiff, the defendants Hod-

¹ *Salt v. Marquess of Northampton*, [1892] App. Cas. 1 (1891), *acced.*

dinott were the owners of the Witchill Hotel, Cadoxton, Glamorgan-shire, in which they carried on their business as hotel keepers. The plaintiff had a mortgage on the hotel for £7654, which was secured by an indenture of March 18, 1896, by which the defendants covenanted, in the usual way, for payment of the principal, with interest at £5 per cent., on September 18 next. This deed also contained a joint and several covenant by the defendants that "they, their respective executors, administrators, and assigns, owners, or tenants for the time being of the said premises, will during the continuance of this security take of and deal with the plaintiff, his executors, administrators, or assigns only for all beers and stout or any other description of malt liquors (except bottled beers) which shall be vended to be consumed on or off the said hotel and premises; and while any money is owing on the security of these presents deal exclusively with the plaintiff, his executors, administrators and assigns for all malt liquors as aforesaid sold thereupon or upon any premises taken or used in connection therewith, or in anywise under or by virtue of the license or licenses now existing or being in force in respect of the same premises, including any occasional or subsidiary license, and will not sell or permit the sale or consumption upon the said premises of any such liquors as aforesaid (except bottled beers), other than such as shall have been purchased or taken of the plaintiff, his administrators or assigns." There was a proviso that "if the defendants, their executors, administrators, and assigns shall observe fully and in all respect the covenants on their part hereinbefore contained," then the plaintiff would not call in the loan for five years. The deed also contained a proviso that notwithstanding the proviso for redemption, the defendants should not be entitled to require or compel the plaintiff to receive his principal before the expiration of five years from the date of the deed. The plaintiff also covenanted with the defendants during the continuance of the security to supply them with beer and stout or other malt liquors of the usual quality at certain scheduled prices; but the deed in no way charged any money payable for beer, &c., upon the mortgaged premises.

In the spring of 1898 the defendants ceased to purchase their beer and stout from the plaintiff, and intimated that they did not intend to purchase any more malt liquors from him, as they were advised that they were not bound by the covenant to do so; and they also claimed to be entitled to redeem the mortgage at once.

On May 4, 1898, the defendants tendered to the plaintiff the amount of his principal and interest to date, with a further sum for six months' interest in lieu of notice; but the plaintiff declined to accept it.

On May 10 the mortgagors took out an originating summons against the mortgagee to compel redemption.

On May 23 the plaintiff commenced this action, claiming an injunction restraining the defendants during the continuance of the mortgage, their servants or agents, from selling or permitting the sale or consumption upon the Witchill Hotel of any beer, stout, or other malt liquors (other than bottled beers), which shall not have been purchased and taken from the plaintiff, and for damages.

The plaintiff moved before Romer, J., on June 10, 1898, for an interim injunction in the terms of his claim. The defendants' summons for redemption was adjourned into court, and came on for hearing with the motion.

Levett, Q. C., and *R. F. Norton* for the motion. The covenant to purchase malt liquors from the mortgagee during the continuance of the mortgage in no way clogs the redemption; any money owing to us for beer is not charged on the mortgaged property. A proviso for the continuance of the loan for a term certain is very usual, and is a lawful provision; see the remarks of Jessel, M. R., in *Teecan v. Smith* (1882), 20 Ch. D. 724, 729; and the mortgagor cannot compel the mortgagee to accept, against his will, repayment otherwise than in accordance with the contract; *West Derby Union v. Metropolitan Life Assurance Society* (1897), A. C. 647. The covenants for the purchase and supply of beer have nothing to do with the equity of redemption. Covenants of this kind are valid and can be enforced; *Luker v. Dennis* (1887), 7 Ch. D. 227; profits made under a covenant of this kind are lawful, and would not have to be accounted for by a mortgagee in possession; *White v. City of London Brewery Co.* (1888), 39 Ch. D. 559. There is nothing unreasonable or oppressive in these provisions; it was part of the terms of the loan that the mortgagor should buy beer from us during the continuance of the security; it may be a collateral advantage, but *Mainland v. Upjohn*, 41 Ch. D. 126, shews that this may be done under a bargain deliberately entered into by the parties while on equal terms and without any improper pressure or unfair dealing on the part of the mortgagee. No charge of improper pressure or unfair dealing is made against this mortgagee. For these reasons we are entitled to have the bargain entered into by the mortgagors, when the loan was made, enforced by injunction.

Farwell, Q. C., and *Inghen* for the mortgagors. The covenant binding the mortgagors to buy all malt liquors from the mortgagee during the continuance of the security is bad as a collateral advantage stipulated for by a mortgagee; *James v. Kerr* (1889), 40 Ch. D. 449; a mortgagee is not entitled to anything more than his principal, interest, and costs; *Jennings v. Ward*, 2 Vern. 526; *Fidd v. Hopkins* (1890), 44 Ch. D. 524. It is well known what large

profits are made by brewers out of tied houses, and it may be that a covenant of this kind will give the mortgagee the whole amount of his principal and interest by way of profits, and that is an unfair collateral advantage, which, if *Jennings v. Ward*, 2 Vern. 520, is good law, cannot be maintained.

[ROMER, J. The proposition stated in *Jennings v. Ward*, 2 Vern. 520, seems to me to be too wide, having regard to the later authorities.]

The rule was recognized by Lord Bramwell, though unwillingly, in *Salt v. Marquis of Northampton*, [1892] A. C. 1, 19. This is an attempt by a brewer under the guise of a mortgage to get all the advantages of a tied house: a bargain that the Court has never allowed between mortgagor and mortgagee.

With reference to the summons to redeem, we submit that, notwithstanding the provisos for the continuance of the loan, we are entitled under the circumstances to redeem now. A simple proviso for continuance of the loan for a term certain is good; but this is not a simple proviso for continuance of the loan: the two provisos depend on each other, and are in effect one transaction; this is a clogging of the redemption, and therefore the whole is void. The mortgage is to be irredeemable for five years in order to give effect to this covenant, and an unreasonable bargain of this kind cannot be enforced: *Fisher on Mortgages*, 5th ed. p. 669; *Talbot v. Braddill* (1683), 1 Vern. 183; *Cowdry v. Day* (1859), 1 Giff. 316. For these reasons we submit that the mortgagors are entitled to redeem at once.

ROMER, J. With regard to the summons by the mortgagors to redeem, I do not require to hear counsel for the mortgagee, and I think it will be convenient to dispose of that application at once before hearing the reply on the motion.

It appears to me that I am bound by authority, and also on principle, to dismiss this summons.

I take it that what was said by Sir George Jessel in *Teevan v. Smith*, 20 Ch. D. 729, is good law, at any rate, so far as I am concerned, and, indeed, I trust good law in whatever court the question may ultimately be raised, namely, that, "Although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years." The period in the present case is five years.

Now, I am of opinion that it is obviously to the advantage of both the mortgagor and mortgagee that such a provision should be enforced. Of course, that does not prevent the Court in a proper case from preventing the application of the clause if it is too large, or there are circumstances connected with the proviso which renders it, in the opinion of the Court, unreasonable or oppressive. In

the present case I can find nothing unreasonable or oppressive in the proviso which prevents the mortgagors from redeeming for the five years. The term is not unreasonable, nor is there anything connected with the proviso which would render it unreasonable or oppressive in the eyes of the Court. It is said that it is not in itself bad, but that it is made so by reason of the covenant in the mortgage which compels the mortgagors during the continuance of the security to buy their beer from the mortgagee, who is a brewer. Well, that covenant is either in itself unreasonable, or not unreasonable. There is nothing before me to shew that as a covenant it is unreasonable, under the circumstances, there being a covenant almost corresponding by the mortgagee, the brewer, to supply. There is nothing oppressive in it itself. There is no evidence to shew me that it is unreasonable or oppressive. Whether, apart from being unreasonable or oppressive in fact, it ought to be void as infringing any principle of equity, I need not now decide, though I shall have to decide that hereafter. Either that covenant is void, or not void, on such a principle. If it be void, then I do not see why I should make the proviso precluding the redemption for five years bad, because there is also another void provision in the deed. And if it is not void, why should I disregard the proviso restricting the power to redeem for five years because of the existence of a covenant which the Court considers enforceable, and which is not unreasonable? It seems to me, therefore, that, looking at the mortgage as a whole, there is nothing here which in my opinion would prevent this proviso precluding the redemption for five years being enforced by the Court. I accordingly enforce it. I am of opinion that it is a proviso which stands by itself, and is distinct from the prior covenant in the deed which deals with the time during which the mortgagees are to be prevented from calling in their money. For these reasons, I hold that the mortgagors are wrong in claiming to redeem at once, i.e., before the five years have expired; and I therefore dismiss this summons with costs.

Farwell, Q. C. I am afraid that the dismissal of an action or summons for redemption operates as a foreclosure. I would suggest that the order should be, "The Court being of opinion that the application by the mortgagors was premature, no order except that they do pay the costs of the summons."

Romer, J. That is quite right: take your order in that way. I certainly did not intend you to be foreclosed.

Lerett, Q. C., in reply. The effect of the decision in *Jennings v. Ward*, 2 Vern. 520, as stated in the text-books, is misleading; all that case decided was that no fetter can be put on the redemption. *French v. Baron* (1749), 2 Atk. 120, is to the same effect. The result of all the authorities when carefully examined is this—that

for purposes of redemption the Court will not allow in the accounts any bargain increasing by collateral means the sum payable for principal, interest, and costs. None of the cases relied on by the mortgagors shews that a reasonable stipulation of this kind cannot be enforced.

ROMER, J. There is a great principle which I think ought to be adhered to by this Court, and by every Court where it can possibly do so; that is to say, that a man shall abide by his contracts, and that a man's contracts should be enforced as against him. Undoubtedly there are certain principles of equity, especially those relating to mortgagors and mortgagees, which have to a certain extent interfered with that general principle, and with those cases I shall have to deal. But before I do so I wish in the first place to point out that, unless there is some doctrine of equity which would otherwise prevent me enforcing the covenant here, the covenant is one which in my opinion ought to be enforced; that is to say, looking at the circumstances (and there is no evidence before me which alters the circumstances as appearing on the face of the mortgage deed itself) it appears to me that the transaction entered into was a reasonable and proper one. The covenants entered into by the mortgagors and the mortgagee with reference to the supply and purchase of beer appear to me to have been reasonable and entered into in good faith, and are in no sense oppressive upon the mortgagors. Unless, therefore, there is some principle of equity affecting mortgagors and mortgagees which prevents me from enforcing this covenant, I ought to enforce it. I should be very sorry indeed if I found there was any such principle; and on considering the principles to which my attention has been called, and the authorities bearing upon them, I am glad to say that I do not think there is any principle or any authority which prevents me from enforcing this covenant as against the mortgagors.

Now, there is a principle which I will accept without any qualification for the purpose of my present judgment (although possibly even that principle might have to be considered narrowly with reference to special cases) that on a mortgage you cannot, by contract between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption, so as to prevent the mortgagor from redeeming on payment of principle, interest, and costs. Of course, I mean redeeming at the time agreed upon between the parties for redemption.

Does that principle apply to the case before me so as to prevent this covenant by the mortgagors from being enforced against them? I am clearly of opinion that it does not. There is nothing in this covenant which clogs the equity of redemption. The mortgagors' right to redeem under the mortgage deed stands exactly the same

whether this covenant to take the beer from the brewer, the mortgagee, is in the deed or not. The mortgagee by virtue or in respect of that covenant has no right to stop or check redemption. He could not stop redemption because there had been any breach of that covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under or by virtue or by reason of any breach of that covenant by the mortgagors. It therefore appears to me impossible to say that this covenant in any way interferes with the principle about not clogging the equity of redemption. But then it is said on behalf of the mortgagors that there is a much larger principle which would prevent this covenant from being held binding on them, and they say that the principle is stated in the case of *Jennings v. Ward*, 2 Vern. 520, which is a well-known authority, where the Master of the Rolls undoubtedly said that a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. I have already dealt with the question of clogging the redemption. It is said that the observations of the Master of the Rolls are to be taken to their fullest extent, and that in every case it is to be taken that a mortgagee shall not have interest for his money and a collateral advantage besides for the loan.

Now, I must say it appears to me always a good principle in dealing with general observations to bear in mind the case in which those observations were made, and with reference to what circumstances they were made. And when I turn and look at the circumstances of *Jennings v. Ward*, 2 Vern. 520, two things appear. In the first place, the Master of the Rolls was dealing in fact with a case where a mortgagor came to redeem, and it was sought to clog his redemption by saying that there was a collateral agreement with regard to other property which ought to prevent his being allowed to redeem. It was, in fact, a case of clogging the equity of redemption. But beyond that, when you look and see what was the collateral agreement in question there, it is to be observed it was one about which the Master of the Rolls said that it must be set aside as unconscionable. So that it was a case where the collateral agreement was unconscionable in itself, and it was in reference to a case like that that the Masters of the Rolls made the observation that he did. Moreover, it is very important to bear in mind that when the Master of the Rolls made that observation the usury laws were in force, and the Courts were very anxious to prevent a person getting a rate of interest beyond what he was entitled to receive under the guise of collateral advantages not expressed to be in the form of interest. Now, can I find in any subsequent case any decision which shows that the observation of the Master of the Rolls is to be taken as

unlimited? I can find no such case. The cases to which I have been referred, and which I have considered, are really cases, when you examine them, where it is sought to clog the equity of redemption by saying that the mortgagor seeking to redeem has to pay some sum beyond what was really due for principal, interest, and costs. That is so, for example, in *French v. Baron*, 2 Atk. 120, and other authorities, where the question concerned the costs of a receiver of the rents and profits of the mortgaged premises. In these cases the question was one of account. The question was, What was due when you came to redeem?—not the question, in substance, whether an honest and proper agreement, entered into without oppression and reasonable, ought to be held void simply because it was a contract between mortgagor and mortgagee. And I point out that you must certainly put aside the cases before the repeal of the usury laws, which stand on a different footing, and, of course, cases of oppression and unreasonableness. Lord Eldon, in the case of *Chambers v. Goldwin* (1804), 9 Ves. 254, stated the law of the Court at the time on the subject in question. I need not repeat that judgment now, because it is set forth in Kay, J.'s, judgment in *Mainland v. Upjohn*, 41 Ch. D. 126. I need only say that I agree with what Kay, J., says at the top of page 138 of that report as summing up how the law stood. He says: "I read that for this reason that Lord Eldon there, although no doubt one objection he makes to these exactions was that they tend to usury, still does not rest his objection entirely upon that ground. He says, besides, that they are oppressive, and are exactions that a mortgagee is not allowed to make."

Putting aside questions of usury, and putting aside contracts which are oppressive, or which are exactions that a mortgagee is not allowed to make, I see no reason why a contract between mortgagor and mortgagee, entered into in good faith as a reason for the mortgagee advancing his money, should not stand and receive the support of this Court, subject to the limitation I have already pointed out as to clogging the equity of redemption. It appears to me, notwithstanding some observations that you may find, especially some made by Kay, J., in some of his decisions, which I think ought to be interpreted by reference to the special facts of the cases in which those observations were made, it is not true to say that in every contract for a mortgage, every provision is void whereby a mortgagee gets more than the principal he advances, and his interest and costs. I think there is no objection (within the lines I have mentioned) to an advantage being derived by a mortgagee in his contract at the time, and as a term of the advance. Where such an advantage is part of the consideration for the advance, and the mortgagor has the benefit of the advance, he is *primâ facie* bound

by it, unless he can bring himself within some of the limitations laid down by the cases to which I have already referred.

Now, that the principle is not so wide as has been urged before me on behalf of the mortgagors, and that the words of the Master of the Rolls in *Jennings v. Ward*, 2 Vern. 520, are to be taken with some limitation, is clear on the authorities. I need only mention two: *Potter v. Edwards* (1857), 26 L. J. (Ch.) 468, and the case of *Mainland v. Upjohn*, 41 Ch. D. 126, to which I have previously referred. They shew, for example, this: that a mortgagee can contract with his mortgagor that in consideration of an advance of, say, £700, he shall be repaid £1000 at a future time, with interest on the £1000 in the meantime. In that case the bargain stands and cannot be disturbed, and for a very good reason—the mortgagor obtained his advance on the footing and faith of the contract. Here the mortgagors have obtained this advance, and probably at a reduced rate of interest, on the very terms of this covenant, or because of the existence of this covenant—an advantage which they have derived and now seek to escape the consequences of. As I have said, I can find no authority which would shew that such a covenant as this by the mortgagors is, under the circumstances, to be held void. Certainly the cases specially relied on before me on behalf of the mortgagors do not amount to constituting such authority. Take the case of *James v. Kerr*, 40 Ch. D. 449. When looked at it will be found that the facts shew that the agreement there relied upon by the mortgagee was oppressive and improper, and moreover clogged the equity of redemption. Then take the case of *Broad v. Selffe* (1863), 11 W. R. 1036, which has been referred to. That was peculiarly a case affecting a question of account—the right to redeem—questions affecting the clogging of the equity of redemption. The case of *Field v. Hopkins*, 44 Ch. D. 524, was, again, a mere question of on what terms, as to amount, the mortgagor should be permitted to redeem, and, moreover, was a case where the mortgagee was claiming to charge items which, under the circumstances, certainly he never ought to have sought to charge as against the mortgagor. It is to be noticed that when that case came before the Court of Appeal, as it did, they dealt with it purely as a question of construction, and did not, as they undoubtedly would had the argument before me been correct, say that the mortgagee was not entitled to make the charges in question, because the contract with regard to those charges was altogether invalid. It is impossible to suppose that the Court of Appeal, with the learned and experienced judges sitting there, would have overlooked a point of this kind if such a point could have been made.

Lastly, the case before the House of Lords, *Salt v. Marquis of Northampton*, [1892] A. C. 1, had nothing whatever really to do

with the point I have to decide here. That was merely a question whether a certain policy was mortgaged; and when the House of Lords held that the policy was mortgaged, it of course followed that in equity a bargain seeking to prevent the mortgagor from having the right to redeem it could not be enforced. I need scarcely point out, therefore, that that has no bearing really upon the question before me.

Finding, therefore, as I do in the result, an honest bargain entered into, the benefit of which has been obtained by the mortgagors, and finding, as I am glad to say and as I think, no principle or authority which prevents me from enforcing this contract on the mortgagors' part, I enforce it accordingly, and therefore grant the injunction in the terms of the notice, limiting it according to those terms during the continuance of the security; and the defendants, of course, must pay the costs.

C. A.

The defendants appealed from the order on the motion. The appeal was heard on July 6, 1898.

Farwell, Q. C., and *Ingpen* for the appeal. We contend that the covenant to take beer from the mortgagee alone is invalid.

[COLLINS, L. J. A mortgagee may now stipulate for any rate of interest he likes. Why may he not take a lower rate and stipulate for a collateral advantage of this kind?]

Jennings v. Ward, 2 Vern 520, lays down the broad principle that a mortgagee shall not by the mortgage deed stipulate for any advantage beyond principal, interest, and costs. *Chapple v. Mahon* (1870), 1r. R. 5 Eq. 225, does not merely say that a covenant for a collateral advantage to the mortgagee will not be enforced in a foreclosure or redemption suit, but that it is void. *In re Edwards's Estate* (1861), 11 Ir. Ch. Rep. 367, affirms the same principle. Romer, J., appears to lay down that any bargain between mortgagor and mortgagee which is not unconscionable and does not clog the equity of redemption is valid, but in this he ignores the above rule. In *Chambers v. Goldwin*, 9 Ves. 271, Lord Eldon lays it down that a mortgagee cannot stipulate to be a receiver of West India estates with a commission, nor stipulate for any advantage beyond the interest. Afterwards mortgagees of West India estates, if not in possession, were allowed to be consignees and to charge commission; but Lord Brougham in *Leith v. Irvine* (1833), 1 My. & K. 277, refused to extend the practice to a mortgagee in possession, and expressed a doubt. *ibid.* 292, 295, whether *Bunbury v. Winter* (1820), 1 Jac. & W. 255, was rightly decided, and whether *Cox v. Champneys* (1822), Jac. 576, supported the case of the mortgagee. In *Potter v. Edwards*, 26 L. J. (Ch.) 468, a mortgage was given for

£1000, though only £700 was advanced, and Kindersley, V. C., held that there could only be redemption on payment of £1000 with interest and costs. This may be treated as if the mortgagee had paid the £1000, and by subsequent gift received the £300 back again. In this case the point here in question was not argued. *Mainland v. Upjohn*, 41 Ch. D. 126, follows *Potter v. Edwards*, 26 L. J. (Ch.) 468, but is opposed to the decision of Lord Romilly in *Broad v. Selfe*, 11 W. R. 1036, there referred to, and it is submitted that this authority ought to have been followed. *Eyre v. Hughes* (1876), 2 Ch. D. 148, affirms the rule that a mortgagee will not be allowed in the mortgage deed to stipulate that he shall be allowed commission on rents received by him. The cases of *James v. Kerr*, 40 Ch. D. 449, 460, *Field v. Hopkins*, 41 Ch. D. 524, and *Salt v. Marquis of Northampton*, [1892] A. C. 1, 12, all support the principle that a mortgagee not only cannot clog the equity of redemption, but cannot bargain for any collateral advantage. Moreover, in this case the equity of redemption is clogged, for the mortgagors cannot let the property to the same advantage when it is burdened with a covenant of this nature.

Levell, Q. C., and *R. F. Norton* for the mortgagee were not called on.

LINDLEY, M. R. We have listened to a very ingenious and learned argument with the view of inducing us under pressure to lay down a proposition of law which would be very unfortunate for business men. The proposition contended for comes to this—that while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction. Mr. Farwell did not attempt to uphold this on any rational principle, but relied on authority. Of course, we must follow settled authorities whether we like them or not; but do they support this proposition? *Jennings v. Ward*, 2 Vern. 520, was the first case relied upon. That was a redemption suit, and the stipulation which was in question seriously interfered with the redemption of the mortgaged property, and the Master of the Rolls (Sir J. Trevelyan) decreed redemption without regard to that stipulation. He is reported to have said: "A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That has been understood as meaning exactly what was said, without regard to the circumstances of the case, and has found its way into the text-books as establishing that a mortgagee cannot have principal, interest, and costs, and also some collateral advantage. But that supposed

rule has been departed from again and again. Take the case of West India mortgages: it has been repeatedly decided that the mortgagee, if not in possession, may stipulate that he shall be appointed consignee. The proposition stated in *Jennings v. Ward*, 2 Vern. 520, is too wide. If properly guarded it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest, and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority. The proposition laid down by Hargreave, J., in *In re Edwards's Estate*, 11 Ir. Ch. Rep. 367, that where an onerous contract entered into by a mortgagor with his mortgagee is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced, goes too far, though the decision of the learned judge was correct; for the stipulation with which he had to deal was unreasonable, and one which ought not to be enforced. The appeal will be dismissed.

CHITTY, L. J. The mortgage here is a mortgage of a public house for a time certain by publicans to a brewer, effected in the usual way, and it contains a covenant by the mortgagors during the continuance of the security to take all their beer from the mortgagee, and a covenant by the mortgagee to supply it. It is contended that the covenant by the mortgagors is void in equity. The first objection I have to make is that it in no way affects the equity of redemption, for it is not stipulated that damages for breach of the covenant shall be covered by the security, and redemption takes place quite independently of the covenant; so this is not a case where the right to redeem is affected. Equity has always looked upon a mortgage as only a security for money, and here the right of the mortgagors to redeem on payment of principal, interest and costs is maintained. It has been contended that the principle is established by the authorities that a mortgagee shall not stipulate for any collateral advantage to himself. I think the cases only establish that the mortgagee shall not impose on the mortgagor an unconscionable or oppressive bargain. The present appears to me to be a reasonable trade bargain between two business men who enter into it with their eyes open, and it would be a fanciful doctrine of equity that would set it aside.

As regards the authorities, *Jennings v. Ward*, 2 Vern. 520, was relied on. That was a redemption suit, and the Master of the Rolls

decreed redemption without regard to a certain agreement which he considered unconscionable and set aside as being "unreasonable," as appears from the registrar's book, which we have now in Court: Reg. Lib. 1705, fol. 495. The statement by Hargreave, J., in *In re Edwards's Estate*, 11 Ir. Ch. Rep. 367, that a mortgagor is considered to be under pressure is not a universal principle. The first great departure from any such principle is found in West India mortgages, where a mortgagee is allowed to be consignee if not in possession. It was found that the supposed rule to the contrary, founded on the dicta, not the decisions, of judges, would not work, for that mortgagors could not obtain money except on these terms. *Potter v. Edwards*, 26 L. J. (Ch.) 468, is a clear authority the same way. There it is said that the money was paid and partly repaid as commission; but that is a fiction. The plain transaction was that the mortgagor agreed to receive £700 and give a mortgage for £1000. *Mainland v. Upjohn*, 41 Ch. D. 126, is another illustration. The decision of Hargreave, J., in *In re Edwards's Estate*, 11 Ir. Ch. Rep. 367, was right, for in that case there was an unconscionable bargain, and a direct clog on the right to redeem. It is unnecessary to say more: the covenant in this case is not avoided by any such supposed rule of equity as has been contended for.

COLLINS, L. J. I am of the same opinion. Apart from authority, no one would say that this stipulation was invalid, for it seems a reasonable and businesslike one. But it is said that mortgages are subject to a long series of decisions, and no doubt equity judges have tried to lay down some principle which would explain satisfactorily the decisions of their predecessors and account for their own, but in so doing they have sometimes laid down principles which, when applied to other cases, are too wide. The fact is that those decisions were given in particular hard cases, and judges have afterwards endeavored, not always successfully, to reduce them to a general rule. The only safe thing is to see how far the decisions have gone. It is clear that a mortgage in the view of a Court of Equity is simply a loan on security, and nothing inconsistent with that can be imported into the deed, and Hargreave, J., in *In re Edwards's Estate*, 11 Ir. Ch. Rep. 367, probably had in his mind the principle that provisions inconsistent with the nature of a mortgage are illegal. But the principle which he laid down, that no onerous engagement of any description can be entered into by a mortgagor with his mortgagee on the occasion of the mortgage, was not necessary for the decision of the case before him, for the stipulation there was one which interfered with the right of redemption on payment of principal, interest, and costs.

On what principle can any stipulation in a mortgage deed which does not fetter the right of redemption be held invalid? I think

only on the general principle that effect will not be given to what is unconscientious and oppressive. No narrower principle will work. Here the provision is reasonable and does not fetter the equity of redemption. The wide proposition in *Jennings v. Ward*, 2 Vern. 520, was not necessary for the decision in that case, and there is nothing in this case to bring it within that decision. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make that stipulation invalid.

SANTLEY V. WILDE, [1899] 2 Ch. 474.—The plaintiff, Miss Kate Santley, being the sub-lessee of the Royalty Theatre, and having an option to acquire the reversion of the head-lease on paying £2000 within a limited time, borrowed that sum of the defendant, S. J. Wilde, on the terms of the loan being repaid with six per cent. interest and secured by a legal mortgage, which was also to provide for payment to said Wilde of one-third of the clear net profit rental of the theatre. The mortgage, executed in pursuance of the agreement, was for the whole of the term acquired by the plaintiff, less one day, and contained a covenant by her for repayment of the £2000 by twenty quarterly instalments of £100 each, and also a covenant to pay the one-third of the profit rental during the whole of the mortgagor's term, although the £2000 and interest should all have been paid. The property was redeemable only on the payment of £2000 and interest, and all other moneys covenanted to be paid. Some of the instalments being in arrears, defendant gave plaintiff three months' notice to pay off all the principal moneys and interest secured by the mortgage. Plaintiff paid the instalments in arrear, and within the three months tendered the balance of the £2000, with interest to the end of the three months and the costs, but Wilde refused to accept the money.

Plaintiff then brought the present action, claiming (1) a declaration that the mortgage ought to stand as a security for the £2000, or so much thereof as remained owing, with interest, and that so far as the same deed provided for payment to the defendant of a share of the rents and profits, or precluded the plaintiff from redeeming on payment of principal and interest, such deed was invalid and not binding on the plaintiff; (2) redemption and reconveyance.

The defendant counter-claimed for (1) a declaration that during the residue of the leasehold term, notwithstanding that all the principal and interest had been paid, he was entitled to be paid one-

third of the clear net profit rental; (2) an account of what was due on the footing of that declaration.¹

LINDLEY, M. R. The question raised on this appeal is extremely important: I do not profess to be able to decide it on any principle which will be in harmony with all the cases; but it appears to me that the true principle running through them is not very difficult to discover, and I think that it can be applied so as to do justice in this case and in all other cases on the subject that may arise. The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this, that "once a mortgage always a mortgage;" but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule: see 1 Powell on Mortgages, 6th ed. pp. 116 *et seq.*: title, "How a Mortgage is considered in Equity." The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A "clog" or "fetter" is something which is inconsistent with the idea of "security": a clog or fetter is in the nature of a repugnant condition. If I convey land in fee subject to a condition forbidding alienation, that is a repugnant condition. If I give a mortgage on a condition that I shall not redeem, that is a repugnant condition. The Courts of Equity have fought for years to maintain the doctrine that a security is redeemable. But when and under what circumstances? On the performance of the obligation for which it was given. If the obligation is the payment of a debt, the security is redeemable on the payment of that debt. That, in my opinion, is the true principle applicable to the cases, and that is what is meant when it is said there must not be any clog or fetter on the equity of redemption. If so, this mortgage has no clog or fetter at all. Of course, the debt or obligation may be impeachable for fraud, oppression, or over-reaching: there the obligation is tainted to that extent and is invalid. But, putting such cases out of the question, when you get a security for a debt or obligation, that security can

¹ This statement of facts is abbreviated from the report of the case in the court below: [1889] 1 Ch. 747.

be redeemed the moment the debt or obligation is paid or performed, but on no other terms.¹

GLEASON'S ADMX. v. BURKE.

COURT OF CHANCERY OF NEW JERSEY, 1869.

(5 *Green*, 300.)

This cause was heard upon bill, answer, and proofs.

THE CHANCELLOR. The complainant's intestate, in April, 1862, leased of H. M. Post a lot of land of twenty-five feet by one hundred feet at the southeast corner of Prospect and North First Streets, in Jersey City, for the term of fifteen years, with a provision for a renewal for ten years longer. He leased it for the purpose of erecting upon it a building for his business, to front on North First Street. He applied to Burke, with whom he had been in the habit of dealing, for a loan of \$1500 for that purpose. Burke agreed to advance this loan after he should have expended \$500 on the building. Gleason proposed to secure it by mortgage, but upon applying to Mr. Clark, the counsel of Burke, to arrange the matter, he advised that a mortgage should not be taken, but that for the \$1500 Gleason should assign the lease; to this Gleason assented, and executed the assignment on June 1st, 1862, absolute on its face, reciting the consideration of \$1500. Before this assignment was made, Gleason had offered to Burke to let him put up a building on twenty-five feet of the rear of the lot without charge, and that he, Gleason, would permit Burke to occupy that part during the whole term, and he would pay the rent, taxes, and assessments for and upon the whole lot, so that it should not cost Burke anything. He alleged as the ground of this offer that this rear part was of no value to him, and that such a building would bring business to him and add to the value of his premises.

¹ "I take it that it is clearly established now, in the first place, that there is no such principle as is suggested, namely, that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate: and, if he does, he may obtain a collateral advantage: nothing can be said against it, and he can enforce it, always assuming that the bargain is not unconscionable or oppressive. In the second place, I take it also to be clear that there is now no such principle as is suggested, namely, that where a collateral advantage is stipulated for by the mortgagee as a condition of the loan, that advantage or contract is to be presumed to have been given or made under pressure. There is no such presumption, but each case must be decided according to its own circumstances. The Court will look into the circumstances of each case and see whether the bargain come to is unconscionable or oppressive."—*Per Romer, L. J., in s. c. id.* p. 478.

At or shortly after the assignment of the lease it was agreed that Gleason should pay the \$1500 by semi-annual instalments of \$125, until the same and all interest on it should be paid; and that upon such payment Burke should reassign to Gleason the lot, except the twenty-five feet of the rear, which he should retain for the residue of the term and the renewal; and it was agreed that for the term and its renewal Gleason should pay all rents, taxes, and assessments on the whole lot. This agreement was made by parol only, but was to be reduced to writing and signed; it was reduced to writing by Mr. Clark, but both parties neglected to sign it. After the assignment of the lease Gleason finished his house, and Burke advanced the loan as needed for that purpose. Burke built a house on the twenty-five feet, on which he expended about \$1800; it was finished in the fall of that year, after Gleason's house was finished; both were being erected at the same time. Burke has since received the rents of the rear building, amounting to about \$1800, and Gleason and the complainant have paid all rents, taxes, and assessments for the lot. Gleason died in October, 1865, and until his death continued dealing with Burke, who sold him the goods used in his business on credit.

After the complainant became administratrix she tendered to Burke the balance of the loan and the interest accrued on it, and demanded a reassignment of the lease. Burke refused to accept the payment or to reassign the lease, unless he retained the twenty-five feet of the rear of the lot and complainant would agree to pay all the rents, taxes, and assessments for the whole lot for the residue of the term; this she refused to do.

Upon this, complainant brought this suit, alleging that the assignment of the lease is a mortgage only, and that she is entitled to redeem the whole premises, and praying for a reconveyance upon paying the amount of the loan still unpaid, with interest, and upon paying the amount expended by Burke for the building on the twenty-five feet, above the amount received by him for rents, of both which she prays an account may be taken.

The defendant contends that this was an absolute sale of the lease, with an agreement to convey part of the premises upon payment of \$1500 and interest.

One may convey lands for a certain price, and agree to repurchase them at a fixed time, for a certain amount exceeding the price received and the interest, without the sale being construed a mortgage or the transaction being affected with usury. But such transactions are suspicious; they are an easy cloak for usury, and their *bona fides* must be clear, and the court must be satisfied that it was not intended to cover usury or to take away the right of redemption upon what was, in fact, intended as a mortgage to secure a loan.

Courts of equity are very jealous of every device or contrivance intended to take away the right of redemption of what is the security for a loan. And one proof that the formal conveyance was intended as a mortgage only is that the transaction commenced by negotiations for a loan and conveying the land as security for the loan. In this case the original agreement was for a loan, and the property was offered by way of mortgage, and the form only was changed at the suggestion of counsel. The transaction must be considered as a mortgage only, and not as a sale and agreement to reconvey part on payment of a fixed sum. Another indication of the transaction being a mortgage existing in this case is that Gleason agreed to pay back the principal and interest at fixed times.

In a mortgage any agreement to pay more than the sum loaned and lawful interest is usury; so also must an agreement to allow the lender to retain part of the land mortgaged after being repaid the loan in full be treated as usurious; and neither will be enforced by courts of law or equity. If this was the whole of this transaction, the complainant would be entitled to the full relief sought.

But a borrower and lender may lawfully make other bargains, even relating to the mortgaged property; and if they are not in consideration of the loan or the condition of its being made, and are otherwise lawful, they may be enforced.

If Gleason had not borrowed money of Burke, he might lawfully have given him without consideration the right to occupy part of his lot for the term on the conditions here agreed upon; and if Burke had erected the building in accordance with the gift, the gift would be valid, and would be enforced in equity. In this case it needed no agreement in writing, the legal title to the land for the term was in Burke by the assignment; and effect can be given to it by limiting the quantity of land to be reconveyed in ordering redemption according to the actual agreement between the parties. It is certainly a case in which the gift should be shown by clear proof. But it is sustained by the testimony of Scott and Burke, and the subsequent agreement in conformity with it is proved by Clark and by the fact that Gleason, in his life, permitted Burke to build, to rent the building, and receive all the rents, while he paid all the ground rent and the taxes and assessments for the whole lot. These facts and the testimony of Clark are consistent with the fact that the gift of the twenty-five feet was a usurious premium for the loan. But the evidence of Burke and Scott shows that the gift was made for other reasons, and was not connected with the loan or a condition of its being made. There is no evidence and no circumstance to contradict or impeach these witnesses.

The complainant is entitled to a reconveyance of the seventy-five feet of the north part of the lot upon being paid the balance of the

\$1500 unpaid with interest, and upon executing an agreement making that part liable for the ground rent, taxes, and assessments on the whole lot, but not for taxes and assessments on the rear building.

THOLEN v. DUFFY, 7 Kans. 405 (1871). BREWER, J. The stipulation in the mortgage in regard to attorney's fees is in these words: "And the said parties of the first part hereby agree that ten per cent. upon the amount due on said note at time of any judgment thereon shall be added to the same and judgment rendered therefor for attorney's fees for collection and services." The learned judge who tried the case charged the jury that this stipulation was valid, and that they might add to the amount found due upon the note ten per cent. thereof, and bring in a verdict for such sum. The verdict they returned really included only between six and seven per cent. for attorney's fees. Stipulations like this have been sustained by the decisions of many courts, and properly so (7 Watts, 126; 51 Penn. St. 78; 3 Wis. 454; 10 Wis. 41; 12 Wis. 179, 452; 15 Wis. 522; 16 Wis. 672; 8 Blackf. 140; 1 Nev. 161; 2 Nev. 199; 21 La. An. 607).

It does not violate the usury law, because it is no stipulation to pay for the use of the money borrowed, but only an agreement to compensate the mortgagee for the expenses of compelling the mortgagor to perform his contract. If the mortgagor pay the money borrowed at the time it becomes due, as he has promised to do, he incurs no loss by reason of this clause in the mortgage. He is wholly released by the payment of the money borrowed and the stipulated interest. Where by the term of a contract a party can discharge himself by paying the real amount due, the transaction is not usurious (Bac. Abr., title, Usury, 6; *Billingsley v. Dean*, 11 Ind. 331; *Lawrence v. Cowlse*, 13 Ill. 577; *Gould v. The Bishop Hill Co.*, 35 Ill. 325). Nor is it against public policy that the expense of a litigation should be borne by the party whose breach of his contract necessitates such litigation. On the contrary, it accords fully with the soundest principles. Our statutes, as well as those of nearly, if not quite, all of the States, provide that the costs—using the term in the limited sense as embracing the amounts due the sheriff, the clerk, and other officers of the court, for their services in the case—shall be paid by the losing party. The theory is that the determination of the suit has shown that his wrong caused the litigation, and, therefore, he should bear the expense. And in many States the court is authorized to award to the successful party, in addition to the amount found due and the court expenses, certain sums for his attorney's costs. Our statutes do not provide

for this additional allowance. But this omission to provide for such compensation in all cases is no argument against the right of the parties to contract for it in some.¹

FOOTE v. SPRAGUE, 13 Kans. 155 (1874). VALENTINE, J. The petition recites the conditions of the mortgage, which show that the mortgagors agreed to pay not only the principal of the debt secured by the mortgage and interest thereon, but also, in case of foreclosure of the mortgage, costs "and fifty dollars as liquidated damages for the foreclosure." The petition then prays for a judgment that the mortgaged property be "ordered to be sold and the proceeds applied to the payment of said debt, costs, attorney fees, etc." The court rendered a judgment for fifty dollars as attorney fees for the foreclosure of the mortgage in addition to the debt, interest, and costs. This the plaintiffs in error claim was erroneous. Upon this question we are inclined to think the plaintiffs in error are correct. The case seems to fall within the decision made in the case of *Kurtz v. Sponable*, 6 Kas. 395. The stipulation in the mortgage in this case, as it was in that, is for a certain sum to be paid by the debtor as liquidated damages over and above the debt and interest and all legitimate costs. Now, what was the term "liquidated damages" in this mortgage designed to cover? If it was designed to cover attorney fees, why did not the parties say so in the mortgage? If it was designed to cover any legitimate charge or expense, why did they not say so? Why did not the parties state precisely and definitely just what it was designed to cover—just what the damages were intended to be for, so that the courts could see whether the damages were such as could be allowed by law or not? If the damages were for usurious interest, then, of course, they could not be allowed. And would it be proper to allow an issue to be framed and a trial had to determine whether these "liquidated damages" were

¹ This represents the prevailing view in the United States. *Pierce v. Kneeland*, 16 Wis. 672 (1863); *Weatherby v. Smith*, 30 Iowa, 131 (1870).

"In the case now before us it is agreed in express terms by the mortgagor, in case of default in payment, that the attorney's fee shall be paid as a part of the costs of collecting the sum of money secured by the mortgage. The agreement to pay such fees is a part of the security itself, and no reason is perceived why the costs incident to the collection of the sum of money secured by the mortgage should not be made a part of the judgment or decree in case the mortgage had to be foreclosed."—*Per* Scott, J., in *Clawson v. Munson*, 5 Ill. 394 (1870). And see *Barton v. Farmers' National Bank*, 122 Ill. 352 (1887).

In a few States, however, such stipulations are regarded as usurious and oppressive. *Thomasson v. Townsend*, 10 Bush. (Ky.) 114 (1873); *Myer v. Hart*, 40 Mich. 517 (1879); *Kittermaster v. Brossard*, 105 Mich. 219 (1895).

intended to cover some legitimate charge or expense or to cover usurious interest? The two cases of *Kurtz v. Sponable*, *supra*, and *Tholen v. Duffy*, 7 Kas. 405, show nearly what the opinion of the court is upon this question. If the stipulation in the mortgage is for the payment of something which the court can see is legal and a valid and legitimate charge or expense, then the court will uphold the same; but if the stipulation is so indefinite that the court cannot tell whether the payment was intended to be for something legal or illegal, then the court will not uphold the stipulation. We think the stipulation is void, and, therefore, the mortgage is the same as though there were no such stipulation contained in it; and, therefore, the judgment for fifty dollars as attorney fees is erroneous (*Slover v. Johnnycake*, 9 Kas. 367).

DALY v. MAITLAND.

SUPREME COURT OF PENNSYLVANIA, 1879.

(88 Pa. St. 384.)

January 16, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKY, and STERRETT, JJ.

Error to the Court of Common Pleas, No. 2, of Philadelphia County. Of July Term, 1878, No. 2.

Scire facias sur mortgage by Henry Maitland against Henry M. Daly and others, executors of John Daly, deceased.

The mortgage was for \$14,000, dated May 6th, 1871, for five years, between John Daly and Henry Maitland. John Daly having died before the commencement of the suit, the writ was issued against the executors and trustees under his will after the maturity of the mortgage.

The pleas were *nil debet* and payment.

The mortgage contained the following clause, "and provided also that it shall and may be lawful to and for the said Henry Maitland, his heirs, executors, administrators, and assigns, when and as soon as the principal sum hereby secured shall become due . . . to sue out forthwith a *scire facias* upon this indenture of mortgage and to proceed therein to judgment and execution for the recovery of the whole of the said principal debt and all interest and taxes due thereon, together with an attorney's commission for collection, viz.: five per cent., besides costs of suit, without any stay, any law or usage to the contrary notwithstanding."

On the trial, after the offer of the mortgage in evidence, the des-

fendants admitted plaintiff's claim for the principal of the mortgage and interest, but resisted his claim for five per cent. commission on the principal of the mortgage.

The defendants submitted the following points, which the court, Mitchell, J., refused:

1. That the plaintiff is entitled to recover upon the mortgage above the amount of the mortgage and interest, a reasonable attorney fee for the collection of the mortgage, and what is a reasonable fee must be proved by plaintiff to recover it.

2. That the plaintiff is entitled to recover under the mortgage sued on only a reasonable attorney fee in addition to the amount of the mortgage and interest.

The court charged as follows:

"The plaintiff is entitled to recover the full amount of his debt covenanted in the mortgage to be paid, including the five per cent. upon the amount of the mortgage debt for collection, that being expressly stipulated for in the mortgage to be paid on a contingency, which is admitted to have happened."

The verdict was for \$14,862.40, which included interest and the five per cent. commission. After judgment the defendants took this writ and assigned for error the refusal of the foregoing points and the portion of the charge noted.

CHIEF JUSTICE SHARSWOOD delivered the opinion of the court March 17th, 1879.

In *Huling v. Drexel*, 7 Watts, 126, it was decided by this court that a stipulation in a mortgage that, in the event of the necessity of proceeding to recover the mortgage by suit, the mortgagee shall be entitled, in addition to the debt and interest, to damages for cost and expenses incident thereto, was not usurious, and might be enforced in the *scire facias*. In consequence of this decision, it has become common to insert a provision not only in mortgages, but notes and other instruments for the payment of money, that the creditor, in the event of being obliged to resort to a suit, shall recover a certain percentage as commissions to the attorney who is retained by him to collect the debt. This commission, it has been held, does not belong to the attorney, but to the creditor. It cannot be collected as costs, but must be included in the judgment (*Mahoning County Bank's Appeal*, 8 Casey, 158; *McAllister's Appeal*, 9 P. F. Smith, 204; *Faulkner v. Wilson*, 3 W. N. C. 339; *Schmidt & Friday's Appeal*, 1 Norris, 524). In *Robinson v. Loomis*, 1 P. F. Smith, 78, it was ruled that such commission was not a penalty, but an agreed compensation to the mortgagee for expenses incurred by the default of the mortgagor.

It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract

fairly entered into, unless it is evidently a penalty. This principle of liquidated damages is not applicable, however, to a contract for the loan of money—at least such stipulation is subject to the control of courts of equity. As in the days of Solomon, “the borrower is servant to the lender,” and courts of equity from the earliest period have assumed the jurisdiction of relieving the borrower from unreasonable and oppressive stipulations, exacted from his necessities, altogether apart from the statutes against usury. Especially has this always been the case as to mortgages. Agreements embarrassing or restraining the equity of redemption have invariably been set aside. The stipulated commission for the attorney may be so far beyond the ordinary rate charged for such services as to require imperatively the interposition of the equitable powers of the court. Equity has always been a part of the law of Pennsylvania. In the administration of equitable principles it is the court and not the jury who exercise the functions of the chancellor, even where the action is in the common-law form. The jury, like the same tribunal in an issue directed by the chancellor, decide disputed facts; but it is the court that must be satisfied and apply the equity on the facts found or undisputed. If they think an equitable title to relief not made out by the proofs, it is their duty so to direct the jury, and *contra* if they think the equity has been established. These rules are so familiar and well settled that it would be a work of supererogation to cite the numerous cases which support them.

We think these principles apply to the questions raised upon this record. The lender of money on any species of security cannot exact an unreasonable stipulation in the shape of an agreed liquidation of damages. Equity interposes her shield to protect the borrower. The debtor in cases of this kind will readily yield to the demand of the creditor, as he would be apt to regard collection by suit as a remote and improbable contingency. Even at law what is reasonable is often, indeed, a question of fact, but in many cases it is a pure question of law. Thus, notice of the non-payment of a promissory note, though it was at first submitted to the jury to decide whether it was within reasonable time, is now unquestionably the exclusive province of the court; so it is now held that after a lapse of seven years an abandonment of a title by settlement is a conclusive presumption of law. No court has ever thought of sending an issue to a jury to determine what is reasonable compensation to trustees. They would be a tribunal entirely unsafe to intrust with such a question. These decisions have been reached by the necessity of certainty in the rules in such cases. Many other illustrations could be given. It is important, unless we are prepared to say that the lender may stipulate for any amount as commissions for the collection of his debt, that there should be some more certain rule than could be reached by submitting every case to a jury. It would

practically in a great number of cases have the effect of destroying the stipulation altogether. If the question must in every case be referred to a jury, the creditor will abandon the claim sooner than encounter the delay and the risk of a very small sum being allowed. The court, from practical knowledge of professional work, are able to say in every particular case what ought to be the compensation or rate of commissions for collecting a debt by suit. Whatever is stipulated beyond a reasonable rate should be relieved against upon equitable principles. Certainly, no certain commission can be determined upon to be applied to all cases. As responsibility, as well as labor and skill, is involved, in reason and the usage of the profession it depends upon the amount collected, but not absolutely so. If there should be no defence to the mortgage or other instrument of writing for the payment of money, the court in giving judgment can decide whether the stipulated rate is too large, and enter judgment for what is right. Should, however, a defence be set up in whole or in part, and the case necessarily go to a jury, it would be the province of the court to instruct the jury what, under all the circumstances, should be allowed, of course not exceeding the agreed rate.

It does not appear by the paper-books that there was in this case any rule for judgment for want of an affidavit of defence, though it does appear that there was no other defence than the amount of the collection fee. Had there been such a rule, the court should have decided the question, and not have sent the case to the jury. We think the learned judge below was right in refusing to leave it to the jury to determine the rate of commission, but he was wrong in instructing them to find the full amount agreed upon. Five per cent. upon \$14,000, in other words, \$700, was far beyond what was reasonable, even in view of the fact that the defendant below had interposed a defence against the commission, and that the case might be carried by writ of error to this court. We think even under these circumstances two per cent. would have been an ample and liberal allowance, and the jury should have been so instructed. In general, this court will not review the exercise of a sound discretion by an inferior court upon such a question, and the presumption will always be in favor of their decision unless it is plainly excessive, or, as appears to have been the case here, founded on the mistaken idea that they had no equitable power to interpose and moderate the agreed amount.

*Judgment reversed, and venire facias de novo awarded.*¹

MERCUR, J., dissented.

VILAS v. MCBRIDE, 62 Hun (N. Y.) 324 (1891). LEARNED,

¹ *Wilson v. Ott*, 173 Pa. St. 253 (1896), *accord*. *Clawson v. Munson*, 55 Ill. 394 (1870), *contra*.

P. J. This is an appeal from a decision in an action of foreclosure. Two questions were submitted to the jury: the first, whether the mortgage was usurious; the second, whether David McBride, grantee, assumed payment of the mortgage as part of the consideration. The jury found the first in the affirmative, the second in the negative. The learned justice adopted these findings as correct, and decided in favor of the defendants. It seems hardly necessary to add anything to the careful opinion written by him. But the amount involved is considerable, and the points in the case have been strongly presented on both sides. We will, therefore, state our views.

The bond and mortgage in question were executed November 9, 1867, by Hiram D. Witherill to Samuel F. Vilas, now deceased, for \$8000, payable in instalments, the last in 1871, with interest at seven per cent. The property mortgaged was the Witherill Hotel. The testimony of Mr. Weyer is that when Witherill applied to Vilas for the loan Vilas objected on the ground that money was worth more than seven per cent., and that he could not make the loan unless he had more than the legal rate; that they then agreed that the manure from the house should be called worth \$100 per year; and that so long as Vilas carried the mortgage he should have the manure from the house as extra interest. The hotel was opened in 1868. It was proved that Vilas did have the manure year after year, and that it was, in fact, worth \$100 per year. In 1881, one Velsey kept the house, and Vilas claimed the manure as his right, said he had it all along; but Velsey refused to let him have it unless he paid fifty dollars per year, which he did for one year.

The plaintiffs urge that as the house was not then finished and the manure would not be in existence until the house was finished, and as Vilas was to have it only as long as he carried the mortgage, the contract was not usurious. The proof, however, establishes that this was intended as an additional compensation for the use of the money, and it was actually received for many years. Where a contingent advantage is reserved to the lender without putting capital or interest in any kind of risk, the contract must be usurious (*Barnard v. Young*, 17 Ves. 44; *Cleveland v. Loder*, 7 Paige, 557; *East River Bank v. Hoyt*, 32 N. Y. 119; *Heidenheimer v. Mayer*, 42 N. Y. Supr. 506). There seems to be no room to doubt here that the agreement was that the lender should, at the least, have the probability of getting an additional advantage, and that this agreement was made in order that he might have more than legal rate. We think the verdict and the decision on this point were correct.¹

¹ Affirmed by the Court of Appeals on above opinion, Nov. 29, 1892 (136 N. Y. 634).

CHAPTER II. (*Continued*).

SEC. IV. TACKING COLLATERAL CLAIMS.

BAXTER v. MANNING.

HIGH COURT OF CHANCERY, 1684.

(1 *Vern.* 244.)

The plaintiff makes a mortgage of his estate to the defendant, and afterwards the mortgagee advances and lends more money unto the plaintiff, the mortgagor, on his bond. The plaintiff brings his bill to redeem. The defendant insists to have his bond debt as well as the mortgage-money paid him.

PER CURIAM.¹ Although there is no special agreement proved in this case, that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both.²

CHALLIS v. CASBORN, Finch, Pre. Ch. 407 (1715). Before LORD COWPER, L.C. In this case it was said by Mr. Vernon, and agreed to by the court, that if a man has a debt owing to him by mortgage and another on bond from the same person, that he cannot tack them together against the mortgagor, but that he shall be let into a redemption on payment of the mortgage money only; but the heir in such case shall not be let into a redemption without payment of both, because the land in his hands is chargeable with the bond, even at law; and now, since the statute against fraudulent devises, the devisee of the equity of redemption is in the same case, and cannot redeem without payment of both, because the statute makes such devise void, as against creditors, and then the devisee stands in the same place as the heir must have done if no devise had been made; but before that statute such devisee would not be liable to the bond debt any more than the mortgagor himself.

¹ Sir Francis North, Lord Keeper.

² Reg. Lib. 1683. A. fol. 730. It was referred to the Master to enquire whether the debts secured in this case by bond were separate or included in the mortgage, and in case they should prove distinct debts, then the decree to be as above, and so made 31st January subsequent. Reg. Lib. 1684. A. fol. 252.

COLEMAN v. WINCH.

HIGH COURT OF CHANCERY, 1721.

(1 P. Wms. 775.)

A., seised in fee of lands, makes a mortgage to B. for £100 and afterwards borrows £100 more of B. upon bond, and dies; the heir at law conveys the inheritance and equity of redemption of the premises to trustees in trust for payment of all the bond and simple-contract debts of his father equally; after which the trustees bring their bill to redeem B., who insists on being paid his debt by bond as well as that by mortgage; and for the mortgagee it was objected,

First, that as he had the estate at law absolutely, and the trustees could not come at it without the interposition of equity, it seemed not agreeable to reason that he should be hindered by this court from receiving what was due to him by bond as well as by mortgage, the former being as just a debt and as much due in conscience as the latter.

Secondly, that if the heir had brought a bill to redeem the mortgage, it was plain he must have paid as well the bond debt as that by mortgage; and if the heir must have paid it, why should any one claiming under him be in a better condition than he himself?

LORD CHANCELLOR [MACCLESFIELD]. The bond of the ancestor, wherein the heir is bound, becomes, upon the ancestor's death, the heir's own debt, for which he is suable in the *debet* and *detinet*; and, therefore, if he comes to redeem the mortgage made by his ancestor, he must pay the debt by bond as well as that by mortgage; but, though this be the debt of the heir, it cannot be said to be due from the heir's assignee, the bond being no lien upon the land: which appears most plainly, in that it was no lien on the land, even against the mortgagor himself, who happened to be indebted to the same person by mortgage and by bond. Suppose one be indebted to A. by mortgage of a term for years, and also indebted to him by bond; if, on the death of the mortgagor, his executor brings a bill to redeem the mortgage, he must pay both; but if the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, he shall only pay the mortgage money. So if the testator, being possessed of a term, mortgages it to A., and becomes also indebted to A. by simple contract and dies, his executor, bringing a bill to redeem, shall pay both the mortgage and the debt by simple contract, because the very equity of redemption is assets to pay simple-contract

debts; but if any creditor of the testator brings a bill to redeem this mortgage, he shall pay only the mortgage.

Lord Chancellor farther said that the law of England in suits against heirs imitated the civil law, where an heir sued by a bond creditor is sued as for his own debt in the *debet* and *detinet*, and is *prima facie* supposed to have assets, but that the heir might discharge himself by saying that at the time of the writ brought he had no assets; or if he has assets descended, may show those assets, of which the plaintiff may, if he pleases, take judgment; and that in case the heir had aliened before action brought, though at law there was no remedy against him, yet in equity he was responsible for the value of the land aliened; but now the heir is made liable at law for the value of the assets he has aliened.

POWIS v. CORBET.

HIGH COURT OF CHANCERY, 1747.

(3 *Atk.* 556.)

LORD CHANCELLOR [HARDWICKE]. The estate, made subject to a five hundred years' term by the will of Corbet Kynaston for the payment of debts, must first be applied before the creditors can come upon the estate descended on his heir at law; for if a testator has created a particular trust out of particular lands, and subject to that trust devised it over, the devisees can take no benefit but of the remainder after the whole burden is discharged upon it; and as to that the heir at law stands in a better place than the devisees do.

The next question is between the devisees of the real estate which passes by the codicil and the heir at law of the testator; undoubtedly, according to the determination of *Galton v. Hancock*, June 11, 1743, the assets descendible on the heir at law must be applied to the payment of debts before the lands can be charged which are specifically devised.

Another defendant in this cause, and mortgagee, Amye Kynaston, was likewise a bond creditor to Corbet Kynaston; her counsel insisted she had a right to tack it to the mortgage as against the heir, because, assets being descended, he cannot redeem one without paying off the other, for the court will not make a circuit by putting her to the necessity of suing on the bond; and they insisted, further, that the rule was the same with regard to a devisee, and

that the court will not oblige a mortgagee, who is likewise a creditor by bond, to sue him under the statute against fraudulent devisees.

LORD CHANCELLOR agreed this was the rule of the court as to a mortgagee who is likewise a bond creditor against the heir, but did not remember it was ever determined in favour of such mortgagee where there are intervening incumbrancers of a superior nature between his mortgage and the bond, and, therefore, would not direct that Mrs. Kynaston's bond should be tacked to her mortgage.

HEAMS v. BANCE.

HIGH COURT OF CHANCERY, 1748.

(3 *Atk.* 630.)

LORD CHANCELLOR, since Hilary term last, ordered this cause to stand over, to search the register's book for the case of *Ridout v. Lord Plymouth*, which had been mentioned at that time as an authority in point, but, being looked into, it did not appear to be at all similar to the present, in which the question is whether a mortgagee who lent a further sum afterwards upon bond should be allowed to tack it to his mortgage in preference to other creditors under a trust for payment of debts created by the will of the mortgagor?

LORD CHANCELLOR [HARDWICKE]. I have considered this case, and am inclined to think the mortgagee shall not be allowed to tack the bond to the mortgage; with regard to the heir of the mortgagor, the reason why he shall not redeem the mortgage without paying the bond likewise is to prevent a circuitry, because the moment the estate descends upon him it becomes assets in his hands and liable to the bond; a devisee, too, of the mortgaged premises for his own benefit is subject to the same rule since the statute of fraudulent devisees made in favor of bond creditors.

But this is a devise in trust for the payment of debts, and the descent is, consequently, broke; so that, as I am at present advised, I am of opinion the mortgagee can have no priority with regard to his bond, but as to that must come in *pro rata* with the rest of the creditors under the trust; but if the counsel for the mortgagee have an inclination to be heard on this point, it shall stand over.

The Attorney General, of counsel for him, said he thought the

point was too strong against the mortgagee to be maintained, and the court thereupon made their decree accordingly.¹

LEE v. STONE, 5 Gill & J. 1 (Maryland Ct. of App., 1832). DORSEY, J. (p. 21). It has been further contended that the appellants are to be first paid, as well the balance due them from Key as that which appears on the auditor's account—Booth, as the security, being answerable for the defalcations of the guardian; that, the appellants being seized of the legal estate in the land sold, their legal title could not be taken from them until they were paid, not only the remaining balance of the purchase money, [but all other debts] upon whatever account due from Booth to them; and this pretension is rested upon the familiar principles of equity, "that he who seeks equity must do equity;" "that a multiplication or circuitry of action should be avoided."

But these principles have never been carried to the extent that would be necessary to their affording relief to a party in the predicament of the present appellants. They stand here in the character of complainants seeking to enforce their lien for a balance of the purchase money by a sale of the premises on which their lien attaches, and require this court not only to enforce their lien, but to tack to it another debt, apart from such their application entitled to no priority over other creditors, and this to the exclusion of another creditor before the court, whose debt is secured by a lien on the premises. If there be any case to warrant this requisition, it has not been presented to our notice in the argument, and has certainly escaped our researches upon the subject. It is true that if a mortgagor goes into chancery to redeem, upon the axioms of equity above mentioned he will not be permitted to do so but upon payment, not only of the mortgage debt, but of all other debts due from him to the mortgagee. In this there is no prejudice to the

¹ Lord Chancellor [Thurlow] said the only reason why the mortgagee can tack his bond to his mortgage is to prevent a circuitry of suits: it is solely matter of arrangement for that purpose, for in natural justice the right has no foundation."—*Lowthian v. Hasel*, 3 Bro. C. C. 162 (1790).

"I have looked into all the cases, which are very dissatisfactory. The present practice, that a bond cannot be tacked to a mortgage as against the mortgagor, but may against his heir, does not seem to have been always the course. . . . Now, at least by the modern cases, it is laid down that the mortgagee cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, merely to prevent circuitry of action. Why not against the mortgagor, if the rule is that where a man having one security lends more money to the same person, that person shall pay his whole debt, or shall not redeem at all."—*Per* Sir Richard Pepper Arden, M. R., in *Jones v. Smith*, 2 Ves. 372 (1794).

rights of others; nobody has a right to complain; no injustice is done to anybody.

But it is also true that if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear that if a subsequent mortgagee or judgment creditor file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is in effect simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.¹

¹ "There is no doubt as to the right of the plaintiff (mortgagor) to redeem the whole of the premises mortgaged: but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee."—*Per Hosmer, Ch. J., in Scripture v. Johnson*, 3 Conn. 211 (1819). *Welling v. Aiken*, 1 MacM. Ch. 1 (1840); *Lake v. Shumate*, 20 S. C. 23 (1883); *Anthony v. Anthony*, 23 Ark. 479 (1861), and (semble) *Roan v. Sharps Rifle Mfg. Co.*, 33 Conn. 28 (1865), *accord*.

The cases generally are *contra*: *Darrow v. Kelly*, 1 Dail. (Penn.) 142 (1785); *Bridgen v. Carhartt*, 1 Hopk. Ch. (N. Y.) 234 (1824); *Presbyterian Corporation v. Wallace*, 3 Rawle (Penn.) 109, 155 (1831); *Brown v. Cottrell*, 13 Minn. 194 (1868); *Mahoney v. Bostwick*, 96 Cal. 53 (1892); *Brooks v. Brooks*, 169 Mass. 38 (1897).

CHAPTER II. (*Continued.*)

SECTION V. MORTGAGEE'S ACCOUNT.

(a) Waste, Repair and Improvements.

HANSOM v. DERBY.

HIGH COURT OF CHANCERY, 1700.

(2 *Vern.* 392.)

The bill being to redeem a mortgage, on the hearing an account was decreed and £240 reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the LORD KEEPER [SIR NATHAN WRIGHT], on a motion and reading affidavits that the defendant had burnt some of the wainseot and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account.¹

RUSSELL v. SMITHIES.

COURT OF EXCHEQUER, 1792.

(1 *Anstr.* 96.)

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt house, etc.) had been allowed to fall so much out of repair that the rent fell from £22 to £18. Plaintiff had done some repairs and had held 40 years.

Graham & Stanley argued that the mortgagee in possession, be-

¹ "So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste and a certificate thereof, will grant an injunction."—*Per* Lord Ch. Hardwicke, in *Farrant v. Lovel*, 3 Atk. 723 (1750).

ing only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner; 2 Vern. 392; 3 Atk. 518; and that the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

BY THE COURT: The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that, after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them.

WRAGG v. DENHAM.

COURT OF EXCHEQUER, 1836.

(2 Y. & Coll. 117.)

In the year 1828 the plaintiff contracted with the defendant Denham for the purchase of two third parts of a freehold messuage and lands situate at Handley, in Derbyshire, for 350*l.*; and shortly afterwards contracted with some persons of the name of Hawksley for the purchase of the remaining third part. The plaintiff not being able to pay the 350*l.* to Denham, it was arranged that the whole of the property should be mortgaged to Denham to secure the repayment of that sum with interest. This arrangement was duly carried into effect by deeds bearing date in June, 1828. Those deeds were prepared by the defendant, Thomas Clarke, who acted as the solicitor for both parties.

In the same month of June, 1828, the plaintiff being seised of some freehold and copyhold property situate at Woodhead, in the county of Derby, by indentures bearing date the 16th and 17th of that month, reciting that there was due to one Boot, on the security of those premises, 140*l.*, and that the defendants, Thomas and John Clarke, had agreed to pay off the same, and also to advance to the plaintiff 200*l.* more, it was witnessed, that in consideration of 140*l.* paid by the Clarks to Boot, and of 200*l.* paid by them to the plaintiff, the latter covenanted to surrender the copyholds, and released and conveyed the freeholds to the defendants Thomas and John Clarke and their heirs, in trust to sell the premises, and out of the proceeds of the sale to reimburse themselves their costs and expenses; then to repay themselves the 340*l.*

with interest; then to repay Denham his 350*l.* with interest, and to pay the surplus, if any, to the plaintiff.

In 1830 the interest on these mortgages being greatly in arrear, the defendants turned the plaintiff and his family out of the premises, sold the crops, and took and retained possession of the property. The Woodhead property was advertised for sale, but no sale was effected.

The plaintiff now brought his bill to redeem both mortgages, charging that the defendants had been guilty of gross negligence in the management of the property while in their possession, and ought to be made answerable for the damage done through their neglect; charging also that the money stated to have been advanced by the defendant Clarke was the alleged amount of his bill of costs, but was in fact not justly due to him from the plaintiff, and that in fact no bill of costs had ever been delivered; praying accounts of the rents and profits of all the premises, that the defendants might be chargeable for damage done from non-repairs, and that Clarke's bill might be taxed, &c.

The defendants by their answers admitted that the premises were out of repair, but ascribed it to the conduct of the plaintiff and an attorney whom he had lately employed, who, as they alleged, had done various acts to stop the sale of the property, and had thereby prevented respectable tenants from hiring it. The charge in the bill respecting the mortgage made to the Clarkes was explained thus: that 140*l.* was advanced by them to pay off Boot's mortgage; 126*l.* 1*7s.* to pay the Hawksleys for their one-third of the Handley premises; and 78*l.* 16*s.* 5*d.* for Thomas Clarke's bill of costs. The defendant Clarke also insisted that before the plaintiff executed the mortgage deeds of the 16th and 17th June, 1828, he carefully inspected the bill of costs, and made no objection to any item therein; but the defendant did not recollect whether he had delivered to the plaintiff a copy of his bill of costs.

The cause coming on for hearing, the plaintiff gave evidence of bad husbandry and want of repairs on the premises since August, 1830, when the defendants took possession. In reference to the Handley property, one witness swore that a field of about three acres and a half was fallowed in the summer of 1831, and laid down on such fallow, and that three crops following the fallow had since been sold therefrom; and that the fourth crop was a hay crop, which was then growing thereon; and that the greater part of the remainder of the farm which should have been fallowed had not been so, but had been hardly cropped, without an adequate quantity of manure laid yearly thereon. It was also proved that the barns and out-buildings on the freehold premises were in a tenantable

state of repair in 1830; but since that time they had become very ruinous for want of necessary repairs, the wet being allowed to get in. In the judgment of the witnesses, the Handley property was in August, 1830, worth 16*l.* per annum, but now not above 9*l.* per annum. The Woodhead property was not so much depreciated.

Mr. Spence and *Mr. Hall*, for the plaintiff, submitted that special directions ought to be given respecting the deterioration of the property, and that Clarke's bill of costs ought to be taxed, 78*l.* being an exorbitant charge. Besides, it did not appear that any bill was properly delivered. [ALDERSON, B. No doubt the bill ought to be looked at by the Master. The attorney prepared the mortgage in his own favour, and part of the consideration money is paid over to his own client.]

Mr. Twiss and *Mr. Hayter*, for the defendants, Denham and Clarke.—No enquiry as to specific mismanagement ought to be allowed. If specific waste had been committed on the premises, as, for instance, by pulling down a house and selling the materials, such an enquiry would have been essential, but that does not apply to mere depreciation arising from bad husbandry. [ALDERSON, B. In *Hughes v. Williams*, 12 Ves. 495, Lord Eldon says, that "if the mortgagee can be shewn to be guilty of such gross negligence as comes up to the description of wilful default, he ought to be answerable for it." The question is, whether there has not been here such gross negligence as to occasion depreciation; not merely, whether there has been mishusbandry. What is alleged by the witness as to the manner of cropping the land, appears to be gross misconduct in the mortgagees.] The question is not between landlord and tenant, but between mortgagor and mortgagee. The tenant is under a contract with his landlord for the proper management of his farm, but the mortgagee is in no such situation. If, failing to obtain his principal and interest, he gets possession of the premises, he ought not to be responsible for anything beyond fraud. As to the bill of costs, it is clear, that unless it contains a taxable item, it ought not to be submitted to the Master for taxation. [ALDERSON, B. It is in the nature of a bill of costs which has been paid; and I think the Master ought to look at it.] If it is submitted to him with a view to surcharge and falsification, the plaintiff ought to point out the particular items which he objects to.

Mr. Spence, in reply, contended that it could not be consistent with the duty of a mortgagee in possession, so to manage the property, that when the mortgagor came to redeem, it was not worth half its value. He cited *Russell v. Smithies*, 1 Aust. 96, as shewing the principle on which cases of this nature rest, although there,

under the circumstances, the decision was in favour of the mortgagee.

ALDERSON, B. There is no dispute that the account will be taken, generally, in the ordinary manner. The decree will direct the Master to take an account of the principal money and interest due to the mortgagees, to charge them with the rents and profits received by them since they took possession, and to take an account of the crops sold by them since that period; and upon making all due allowances, the Master will and ought to deduct from the monies found to have been received from the sales the expenses of the sales, and all necessary expenses which the mortgagees incurred to obtain a transfer from the purchasers of the crops of the monies due upon such sales.

The next question is, whether I ought to direct the Master to enquire into the amount of the bill which formed part of the consideration for the mortgage executed by Wragg to his attorney. I think I ought; because it appears to me that, Clarke and Wragg being in the situation of attorney and client at the time these transactions took place, Wragg's assent to the bill of costs was not such an assent as ought to preclude him from an enquiry upon the subject before the Master. At the same time it would be unreasonable to require Clarke now to enter into evidence of business done for his client; and the only question will be, whether, if the business were done, the charges are fair and reasonable. If the Master thinks that they are not so, he must make a deduction in that respect.

Then comes the important question whether I ought to charge the defendants with the deterioration in the value of the premises since the period when Clarke took possession. It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in *Anstruther*.¹ There, the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the mean time in the ordinary way. I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee; gross negligence is suffi-

¹*Russell v. Smithies*, p. 506, *supra*.

cient. The question therefore is, whether the fact of gross negligence is sufficiently established in this case to enable me to direct the enquiry asked for by the plaintiff. Upon that point I should like to look more minutely into the evidence, because if the Master be directed to make that enquiry, there will be considerable additional expense. If upon examination of the evidence I should come to the conclusion that a *prima facie* case of gross negligence is made out, I must direct the enquiry. If, on the other hand, I should be of opinion that there is not sufficient evidence of that fact, of course the principle of law will not apply.

On the following day his Lordship said that he had looked through the evidence, and upon the whole he thought he ought to direct an enquiry as to whether the deterioration in the value of the premises had arisen from the gross negligence in the mortgages for want of proper repairs and proper cultivation. As to the other point, respecting the bill of costs, his Lordship thought that the Master ought to look at the bill with a view to consider the propriety of the items, upon the assumption that the business had been actually done.

Decree accordingly.

SANDON v. HOOPER.

HIGH COURT OF CHANCERY—ROLLS COURT, 1843.

(6 *Bear.* 246.)

This was a suit for redemption.

In 1830 the plaintiff mortgaged some property to the defendant, a solicitor, for 300*l.*; and in 1836 he executed to him a further charge, for a sum of 140*l.*, part of which consisted of a bill of costs due from the plaintiff to the defendant, and other part of arrears of interest and money paid. Default having been made in payment of interest on the mortgage, the defendant, in 1838, by an action of ejectment, recovered possession of the mortgaged property. After the defendant had taken possession, he pulled down two cottages on the premises and made some alterations. By his answer, the defendant stated that he had laid out 300*l.* in substantial repairs and lasting improvements; but of this no evidence was given.

Mr. Chandless, for the plaintiff, contended, first, that there ought to be a taxation of so much of the defendant's demand as con-

sisted of professional costs (*Wragg v. Denham*, 2 Y. & Coll. Exch., 117); secondly, that the mortgagee was liable for the damage done by pulling down the cottages (*Wragg v. Denham*); and, thirdly, that the defendant ought to pay the costs of the suit, it having been occasioned by his improper conduct in refusing to render accounts. (*Detillin v. Gale*, 7 Ves. 583; *Taylor v. Baker*, Daniell, 71; *Harvey v. Tebbutt*, 1 Jac. & W. 197; and see *Wilson v. Cluer*, 4 Beav. 214).

Mr. Kindersley and *Mr. Stevens*, for the defendant, did not oppose the taxation, but contended that the defendant was entitled to an inquiry as to the substantial repairs and lasting improvements, and to be allowed the amount; and that the defendant was entitled to the costs of suit, and of the ejectment.

Mr. Chandless, in reply.—There is no proof of any substantial repairs or lasting improvements; the defendant, therefore, is not entitled to any inquiry.

THE MASTER OF THE ROLLS [LORD LANGDALE]. It is objected on behalf of the plaintiff, and properly objected, that so far as the sum of 140*l.* consists of the bill of costs, which is payable to the defendant, it ought only to stand as a security for so much as will be properly due upon taxation. That is not disputed by the defendant; it has been very properly conceded to the plaintiff, that he is entitled to have that investigated.

In the year 1838, the defendant obtained possession by an action of ejectment, and after he came into possession he pulled down two of the cottages which were upon the premises, and he says, in his answer, that he laid out a considerable sum of money, to the amount of about 300*l.*, for repairs and substantial improvements, which he alleges were done with the privity and knowledge of the plaintiff. First, with respect to the dilapidations, they are proved; and there is not an attempt made in evidence for the purpose of shewing that it was proper. I am therefore of opinion that the plaintiff is entitled to an account of any loss occasioned by pulling down those houses.

The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which

he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving a mortgagor out of his estate—an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property.

Now, in this case, it has also to be considered, whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion, that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made; but, in this case, there is, as to that, a total absence of all evidence whatever. There is evidence, on the part of the plaintiff, to shew that what was done deteriorated the property, and there is not one word in evidence, on the part of the defendant, in support of his allegation, that he has laid out any money for lasting improvements, or that anything he did was done with the privity, consent, or knowledge of the plaintiff. In the absence of all proof, it is not at all within my authority to direct an inquiry to enable him to supply that in the Master's office, which he has already had an opportunity of doing. See *Marten v. Whichelo*, Cr. & Ph. 257. He may have done something towards the improvement of the estate; and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject; but there is no such proof brought forward.

Another point has been raised in this case as to the refusal of the defendant to account. To excuse his refusal, the defendant alleges that he was under a mistake as to the party on whose behalf the application was made; but I think the circumstances sufficiently shew there was no mistake.

Under these circumstances I shall direct no inquiry as to lasting improvements. I think the plaintiff is entitled to an inquiry as to the loss sustained in consequence of pulling down the cottages; he is entitled to a taxation of the bill of costs, which formed part of the consideration for the further charge; and, considering the

course the defendant has taken, I think he is liable to pay some of the costs of this suit. I cannot, however, take it for granted that this suit would not have occurred if the estate had not been dealt with as it appears to have been; I cannot therefore say, that the plaintiff is to be excused from the whole costs of the suit up to the hearing. I think the plaintiff must pay the costs, except those which relate to the claim for lasting improvements, those relating to the plaintiff's claim for compensation for the dilapidations, and those which have arisen from the evidence, which the plaintiff has been obliged to enter into for the purpose of shewing the refusal to account. There must be an inquiry taken of what is due to the defendant for principal and interest, and for the costs payable by the plaintiff.

SHEPARD v. JONES.

SUPREME COURT OF JUDICATURE—COURT OF APPEAL, 1882.

(21 *Ch. D.* 469.)

By an indenture of transfer of mortgage, dated the 31st of January, 1874, the Victoria Brewery and other hereditaments at Wrexham were conveyed to the defendant, Edward Jones, for securing £2000, subject to redemption by Thomas Manby. By subsequent deeds further sums of money were charged on the same premises. On the 10th of October, 1878, Thomas Manby was adjudicated bankrupt, and the plaintiffs, H. Shepard and H. Davies, were appointed trustees of his estate. On the 18th of February, 1879, the defendant offered the mortgaged property for sale by auction under the power of sale in his mortgage, but no bidding was made for it. Several persons also inspected the brewery with a view of purchasing it by private contract, but declined to do so, alleging as their objection to it the inadequate supply and inferior quality of the water in the well on the premises. In August, 1879, the defendant took possession of the brewery, which was then vacant, and placed a person in it to take care of it, but did not himself occupy it.

In the early part of the year 1880 the defendant commenced boring operations to deepen the well, and eventually obtained a good supply of water. The defendant alleged that this was done with the knowledge and acquiescence of the plaintiffs. On the 12th of May, 1880, the defendant again put up the mortgaged premises

for sale by auction, when it was bought by David Johnson for £5000, one of the conditions being that the sale should be completed on the 29th of September following. At that time the principal sum of £4000 and a considerable arrear of interest were due to the defendant. The defendant let the purchaser into possession of the brewery soon after the sale without requiring any rent from him, but the purchase was not completed nor the purchase-money paid on the 29th of September. The purchaser was not a brewer but a manufacturer of zoedone, and used the premises after taking possession as a storehouse for his goods.

The defendant tendered to the trustees £509 18s. 4*d.*, which he considered to be the balance due to them, but they declined to accept it. They claimed in addition rent for use and occupation from the time when the defendant took possession till the 29th of September, 1880, and they also refused to allow the expense to which the defendant had been put to in deepening the well, amounting to about £83. The plaintiffs then brought this action against the defendant, claiming the balance of the purchase-money, and asking for accounts against the defendant as mortgagee in possession. The defendant paid £544 17s. 2*d.* into Court. At the trial the above-mentioned facts were proved, but there was a conflict of evidence whether the plaintiffs had notice of and acquiesced in the deepening of the well.

The action was heard before Mr. Justice Kay on the 20th of February, 1882.

KAY, J. (after stating the circumstances of the case, and referring to the evidence):—

I have listened carefully to the evidence, and have myself put some questions to the witnesses in order to ascertain if possible whether it was the fact that at the second sale the price was in any respect increased or influenced by the fact of the larger supply of water; but there is no evidence whatever that the price was so increased, and in the absence of that evidence, and as the brewery has been bought by a man who seems to be only using it as a warehouse, I cannot come to the conclusion that he gave more for it in consequence of the boring operations.

The rule of law is quite settled, and has never been altered from what was laid down in the case of *Sandon v. Hooper*, 6 Beav. 246, 248. There Lord Langdale states the rule thus: "The next question is whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times shewing what he ought and to some considerable extent what he ought not to do. Such re-

pairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property, but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving the mortgagor out of his estate, an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property." Now it must be under this last branch of Lord Langdale's judgment that the case of the mortgagee must succeed if at all. Had he got the consent of the mortgagor, or given him notice in which he acquiesced? I cannot find that either has been done, but if by any strain of language it were possible to assume that this comes within the case of the mortgagor having had notice in which he acquiesces, then, as Lord Langdale says, the mortgagee may be allowed for sums of money which have been laid out in increasing the value of the property; but then the *onus* would be on him to shew that the money was laid out in increasing the value of the property. Now this as it seems to me he has failed to shew. In the first place there is no consent of the mortgagees or trustees in bankruptcy; and in the second place no notice was given in which they acquiesced; and in the third place the mortgagor has failed to shew that what has been done has increased the value of the property. Therefore I am not able to direct an inquiry as to any improvements. I must say that if I had been satisfied that the value of the property had been increased I should have struggled very hard to prevent the mortgagor getting the purchase-moneys which represented the value of the property without allowing for the expenses that occasioned the increase of value; but, as I have said, I have listened attentively to the evidence, and I am not able to see that the mortgagee has proved that there was that increase, or that there was any notice by which the mortgagor can be fixed as acquiescing in these improvements.

Upon the other point the question is whether the mortgagee has been in such occupation of the property as entitles or makes it just for the Court to treat him as liable to an occupation rent. Now, ac-

cording to a note on the case of *Trulock v. Robey*, 15 Sim. 265, 276, it was thought "advisable to state in a bill to redeem against a mortgagee in possession that the defendant, and if he is not the original mortgagee, those under whom he claims, have been in the actual occupation of the mortgaged estate as owner or owners thereof, in addition to stating that they have been in possession of the estate, and in receipt of the rents and profits of it, and to pray that the Master may set an occupation rent and include it in his account of rents and profits received." In this case it is proved that the mortgagee himself was not in actual occupation or using the premises, but after he had sold the premises to Johnson, he let Johnson take possession and use them, by storing goods there, and Johnson has used them ever since, and is now using them as a warehouse. Then the mortgagee either charged Johnson with rent or did not. I understand he did not, but if he allows that state of things Johnson must be treated as in possession as his agent, because if Johnson had no right to possession under the contract, then permission to take possession being given would make him an agent of the mortgagee. If Johnson has been in possession and using these premises for his own purposes, and the mortgagee does not choose to charge him rent as he ought to do, then the possession by Johnson is the possession of the mortgagee, and if the mortgagee himself had been in possession and using the premises as a warehouse, I could not have the least doubt that he would under the rule be liable to pay occupation rent. Therefore as he chose to let Johnson have that possession and use, I must charge him as though he had been himself in possession from the time when Johnson took possession. Accordingly I direct the usual account in the redemption suit as against the mortgagee in possession, and I direct the usual inquiry as to what he ought to be charged with as occupation rent from the time that Johnson took possession of the estate. I reserve the question of costs.

C. M.

From this judgment the defendant appealed. The appeal was heard on the 21st of July, 1882.

Cogens-Hardy, Q.C., and *Swinfen Eady*, for the appellant:—

We appeal from the judgment on two grounds: first, the defendant is charged with an occupation rent, although he was not in actual occupation of the brewery. No one is liable for an occupation rent unless he is making use of, or deriving profit from, the premises. In the present case the defendant put Johnson into possession of the brewery before the day named in the conditions of sale in order that the expense of a caretaker might be saved, but he received no rent from Johnson.

In the second place the learned Judge refused to allow the defendant the expense of deepening the well. There is evidence that this was done with the knowledge and consent of the plaintiffs. But in truth notice is immaterial if the outlay was for the benefit of the property. In the present case it is clear that the value of the property was increased. It could not be sold until a better supply of water was provided. A mortgagee in possession is always entitled to be allowed for permanent improvements (*Tipton Green Colliery Company v. Tipton Moat Colliery Company*, 7 Ch. D. 192; *Sandon v. Hooper*, 6 Beav. 246; s. c. on appeal, 14 L. J. Ch. 120). Mr. Justice Kay had only before him the report of the case before the Master of the Rolls. The report on appeal materially modifies the law as there laid down. Lord Lyndhurst says that if the value of the property had been increased he would have given the mortgagee the benefit of it.

Rigby, Q.C., and *T. A. Roberts*, for the plaintiffs:—

With respect to the first point, the occupation of Johnson was the occupation of the defendant. It was the defendant's duty to require Johnson to pay rent for the brewery until the day appointed by the conditions of sale for completion of the purchase. As he did not do so Johnson must be treated as his agent or servant. At all events the plaintiffs are entitled to charge the defendant with wilful default in not making a profit by the occupation of the premises, which comes to the same thing as an occupation rent.

The deepening of the well did not really raise the value of the brewery. It was the quality, rather than the quantity of the water, that was deficient. In fact Johnson did not purchase it for a brewery, but for a place for storing his zoedone. Whether the outlay really improved the property is a question of fact which the Judge decided against the defendant, and the Court of Appeal ought not to interfere with his conclusion.

JESSEL, M.R. My present opinion is that the appellant is entitled to succeed on both the points in this case. I have always understood that occupation rent is only charged against a mortgagee who occupies. If one wants authority for that proposition he will find it in the case of *Trulock v. Robey*, 15 Sim. 265. The Vice-Chancellor there says: "A man may have been in possession of an estate without being in the occupation of an acre of it. Anyone is in possession of an estate who receives rent from the tenants who do occupy it. Why did not the plaintiff amend her bill by stating that the defendant had been in the occupation of part of the tenements? How can the Court make a decree on a fact that does not appear on the bill?" Therefore the plaintiffs have to shew that the defendant, the mortgagee, was in occupation. Of course, a man may be in

occupation in law by occupying the house himself personally or by an occupation through his servants. In that sense I agree with Mr. Rigby's argument that a man need not be in what is called personal occupation, but occupation, like most other things in law, is a complex term, and it is impossible for a man to be in occupation if somebody else is in occupation; that is, excluding the case of joint tenants or tenants in common.

Now in this case the sale by auction was to a purchaser of the name of Johnson, and before the time of completion arrived Johnson asked the defendant, the vendor, to let him into possession. I am not going into the question whether he ought to have been let into possession on the terms upon which he was let in. It seems the defendant had a caretaker for him. Therefore he was in occupation through the caretaker in that sense up to the time that Johnson was let into possession. Then Johnson was let into possession on the terms of paying a part of the outgoings, as I understand. Whether they were proper terms or not is a question for inquiry. I have heard nothing to shew that they were not proper terms, but upon that I give no opinion, because there is the usual account directed for wilful default, and if it turns out that he was not let in on proper terms or on reasonable terms, the defendant may be liable for not getting all he might have got. But in no legal sense was the vendor in occupation after he let the purchaser into occupation. The purchaser was not his servant or his agent, but he was a purchaser entering in his own right and obtaining not only legal possession but legal occupation. It appears to me, therefore, there is no case whatever for charging the defendant an occupation rent simply because at that time he was not in occupation. That I think is sufficient to dispose of that part of the appeal which relates to the occupation rent.

With regard to the other point, it is one of more general interest. I have always understood the practice to be quite settled. If upon the hearing of a redemption suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence that he has laid out money in lasting improvements—that is, produces evidence of the laying out of the money, and that the works are *prima facie* improvements—that is sufficient for an inquiry. If he proves more, that is, if he not only proves that he has laid out money in permanent works, but they are really improvements and have improved the property to the extent of the money laid out, he will then get not only an inquiry but an account of the sums laid out in the lasting improvements. But, of course, to get the account he must prove a good deal more than to get an inquiry. Upon that point I will quote some of the words of

Lord Langdale in the case of *Sandon v. Hooper*, 6 Beav. 246, although *Sandon v. Hooper* went too far on another point, and was varied on appeal; but on this point there has been no appeal. Lord Langdale says this: "Now, in this case it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion that it was not necessary for the defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been made." Then he goes on: "He may have done something towards the improvement of the estate, and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject." That is, you want general proof of money laid out, and you want general *prima facie* proof that it has been laid out in lasting improvements. That being so, we have only to consider whether there was in this case proof of both those facts. There was not only general proof, but, as I understand, there was detailed proof as to the money laid out. There is no dispute about that. The money laid out was about £100; but was it proved generally and *prima facie* to be laid out in lasting improvements? Now it stands in this way; the money was laid out in boring for water. That was not at first productive, and then they laid out more money which was productive, and the quantity of water was largely increased. Whether or not that was an increase which added much to the saleable value of the property would be a matter for inquiry, but they did satisfy the two things laid down by Lord Langdale, namely, that they laid out money, and that the money was *prima facie* a lasting or permanent improvement. It was lasting and permanent, and it was *prima facie* an improvement; because it very much increased the quantity of the water in the well, whether we look on it as a brewery property or even as a property not used as a brewery, because it appears that a supply from the water company was no longer required. I think there is sufficient for inquiry even if there were no special circumstances in this case to distinguish it from the ordinary redemption suit. Of course, a mortgagee takes the inquiry at his own risk, as to what may be the result of the inquiry.

But there are very special circumstances in this case which I think distinguish it from an ordinary redemption suit, which puts the right of the mortgagee to the inquiry upon higher grounds. This is not a

redemption suit at all. It is a suit brought by the mortgagor for an account from the mortgagee who has exercised his power of sale of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense which increased its saleable value, I think it is plain on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling-price. It seems to me that wherever there is a case of that kind where the mortgagee can prove that the selling-price was increased by reason of the outlay, then to the extent to which that selling-price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay. Of course the mortgagor could not be made to pay more than the increase; but to that extent it seems to me in ordinary justice the mortgagee is entitled to say, "You shall not get that increased benefit caused by my outlay without paying for that outlay."

In this case it seems that this property was a brewery. It seems also from the evidence that the supply of water was deficient both in quantity and quality, that there was an abortive sale, which was abortive by reason, to some extent at all events, of the defective supply of water, and that thereupon after the abortive sale the mortgagee set to work to supply the deficiency. There is a dispute whether he did supply it altogether. It is said that although he supplied it as regards quantity, he did not do so as regards quality. Then there was a second sale, at which the property sold for a good price, but the purchaser was not a brewer, and it is suggested that the purchaser would have given the same money for the property whether there had been this increase in the supply of water or not. Well, that may be so, but it does not at all follow that the selling value was not increased. It was a sale by auction. A brewer may have attended the sale, or several brewers may have done so, and they may have bid up to the last bidding before that which was bid for by the purchaser, because there was a good supply of water, and it was suitable for brewery purposes. If that was so, the price would be increased by reason of the additional supply of water, although the actual final purchaser did not want the water at all. That does not prove it. All I can say is, that there being in my opinion a *prima facie* case that the property was increased in value, it is fair that there should be an inquiry to ascertain whether it was so increased. Of course that inquiry will be whether any and

what sum ought to be allowed in taking the accounts of the defendant by reason of lasting improvements, and that will leave the whole case open.

There is another observation I wish to make on the supposed necessity of notice, and there are some words in the judgment of Lord Langdale in *Sandon v. Hooper*, which I have always declined to read literally, and which do not appear to me to be warranted by the judgment of Lord Lyndhurst. That is, as to notice. I am by no means prepared to say that Lord Langdale did not mean exactly what I am going to say: I rather think he did; but it was imperfectly expressed either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one, and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If on the other hand it is an unreasonable one, and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession. That being so it seems to me that the real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agrees to it, then of course it is unnecessary for the mortgagee to shew that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the view of a court of law amount to tacit consent, or, as it is sometimes called, "acquiescence," that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either way.

I think that is the true explanation of what was intended by Lord Langdale in *Sandon v. Hooper*, and I think that is the real view of the law on the subject.

Under these circumstances I think the appeal must be allowed. As regards the costs there is an ample fund, and you can add the costs to the mortgagee's costs of this suit.¹

DEXTER v. ARNOLD, 2 Sumner, 108. (Circuit Court of the United States, 1834.) Bill in equity to redeem a mortgaged estate.

STORY, J., delivered the opinion of the court:—

The fourth exception is on account of the Master's having made a deduction of the supposed rent, upon the ground that the premises were out of repair and partly untenable while in possession of

¹ The concurring opinions of Brett and Cotton, L. JJ. are omitted.

the mortgagee and his representatives. The argument seems to proceed upon the ground that the mortgagee was bound to keep the premises in good repair, and therefore ought to be accountable for such rents as he might have obtained if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate. In *Godfrey v. Watson*, 3 Atk. 518, Lord Hardwicke said that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russell v. Smith*, 1 Anst., R., 96, it was decided that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact, also, that there has been a diminution of the value of the rents was there declared not to be sufficient proof of a want of proper repairs. It is quite a different question whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damages occasioned thereby. That was the doctrine asserted in *Hughes v. Williams*, 12 Ves. 495. And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the Master's report which establishes any fact of wilful default or gross negligence in the mortgagee.

These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

MOORE v. CABLE.

COURT OF CHANCERY OF NEW YORK, 1815.

(1 *Johns. Ch.*, 385.)

Bill for the redemption of a mortgage. On the 26th of February, 1789, William Brown being seised of the premises, lot No. 54 in Smith & Graves's patent, conveyed the same to Joseph Roe, who, for securing the purchase money, reconveyed them to Brown by mortgage dated the 27th of February, 1789, and conditioned for the payment of £40, with interest, on the 1st of May, 1790. On the 28th of October, 1794, the mortgage was assigned to the defendant for the consideration of £30 by the brother of Brown, as his attorney. The heirs of Roe, on the 1st of August, 1807, sold and conveyed the premises to the plaintiff with covenants and warranty.

It appeared that the defendant entered into actual possession of the premises, by his tenants, in 1800, but had, previous to that time, exercised acts of ownership. He continued in possession until 1808, when he, in conjunction with one Corbin, took a lease from the heirs of Roe. Corbin, being in as tenant of the defendant, consented to let in the plaintiff with him; and the defendant brought an action of ejectment and recovered judgment in 1813, and has since continued in possession and made improvements by clearing part of the land, and has received the rents and profits. The plaintiff did not know until the trial of the ejectment in 1813, that the defendant held under a mortgage, and had in 1807 offered to purchase his interest.

THE CHANCELLOR [KENT]. Two questions are presented in this case:

1. Is the plaintiff entitled to redeem?¹

2. The next question is, whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be admitted consistently with established principles. The defendant was, in this case, a volunteer. Instead of calling upon the debtor, or foreclosing the mortgage, he elected to enter upon uncultivated lands, and to exercise acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a

¹ The opinion on this point is omitted, the court holding that the possession of defendant was not of such a character nor so long continued as to operate as a bar.

debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. In *French v. Baron*, 2 Atk. 120, the Chancellor would not allow the mortgagee anything more than his principal and interest, though there was a private agreement between the mortgagor and mortgagee for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate. The same thing was repeated in the case of *Godfrey v. Watson*, 3 Atk. 517, and Lord Hardwicke there said that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair; but if the mortgagee had expended money in supporting the title of the mortgagor when it had been impeached, he would allow it. The same doctrine was maintained in the case of *Bonithon v. Hockmore*, 1 Vern. 316, in which it was declared that no allowance was to be made to a mortgagee or trustee for their care and pains in managing the estate.

I shall, accordingly, direct a master to compute the principal and interest due on the mortgage down to the 1st of January last, and that, in taking the account, he charge the defendant with the nett amount of the rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not for improvements in clearing part of the land; and that he report with all convenient speed; all the other questions are in the meantime reserved.

*Decree accordingly.*¹

¹The authorities generally are accord. *Clark v. Smith*, Saxt. (N. J.), 123 (1830); *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McCurran v. Cassidy*, 18 Ark. 34 (1856); *Sanders v. Wilson*, 34 Ver. 318 (1861); *Adkins v. Lewis*, 5 Oreg. 292 (1874); *Cook v. Ottawa University*, 14 Kans. 548 (1875); *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883).

In Pennsylvania the cost of permanent improvements "necessary and beneficial for the proper use of the property" will be allowed in an action of "equitable ejectment" brought by a mortgagor against a mortgagee in possession. *Wells v. Van Duke*, 109 Penn. St. 330 (1885). In Massachusetts, by statute (*Pub. Stat. Ch.* 181, Sec. 23), "All sums expended in reasonable repairs and improvements" are allowed. *Merriman v. Goss*, 129 Mass. 77 (1885). And see *Gordon v. Lewis*, 2 Sumn. 143, 149 (1833), where this doctrine is recognized by Story, J.

But that the right of the mortgagee to an allowance even for necessary repairs is not absolute, see *Bank of Australasia v. United Co.*, 4 App. Cas. 391, 408 (1879), and *Booth v. Baltimore Steam Packet Co.*, 63 Md. 79 (1884). In *Barthell v. Syverson*, 54 Iowa, 160 (1880), such right seems to be denied.

MICKLES v. DILLAYE.

COURT OF APPEALS OF NEW YORK, 1858.

(17 N. Y. 80.)

Appeal from the Supreme Court. The action was for the redemption of certain premises in the city of Syracuse, mortgaged to Philo D. Mickles. The trial was before a referee, who found that the mortgaged premises were, in 1840, conveyed to Philo D. Mickles by one Fitch. There was then outstanding a mortgage upon the premises, executed by Fitch to David Hall. Philo D. Mickles conveyed to the plaintiff, with warranty, March 8th, 1841, for the price of \$4000, to secure \$2000 of which the plaintiff executed a mortgage, which in this suit he sought to redeem. This mortgage and the bond collateral thereto were, in April, 1841, assigned by Philo D. Mickles to John Townsend. Philo D. Mickles purchased the Fitch mortgage on September 23d, 1843, and on the 6th of November, 1843, assigned it to John Townsend, without the knowledge or consent of the plaintiff, so far as the evidence showed. Townsend, on the 23d of September, 1846, sold the premises to Charles A. Wheaton for \$1750, upon a foreclosure of the Fitch mortgage, of which no notice was served on the plaintiff. At the time of this sale, Wheaton was the owner, by assignment from Townsend, of the mortgage for \$2000, executed by the plaintiff to Philo D. Mickles. Wheaton took possession of the premises, and conveyed the same, with warranty, December 19, 1846, to John A. Robinson, who conveyed, November 19th, 1852, to Henry A. Dillaye, also with warranty. The only question in dispute in this suit was as to the allowance to be made to Dillaye for improvements after he took possession under the deed from Robinson; the effect of the purchase by Philo D. Mickles of the Fitch mortgage being the subject of litigation in another suit.

P. D. Mickles was in possession of the premises at the time he conveyed them to the plaintiff, and when he received the mortgage now sought to be redeemed. From that time until the sale under the attempted foreclosure he continued to rent them in his own name and to receive the rents, without disclosing the interest of the plaintiff. They were assessed to him. Wheaton, the purchaser, went into possession immediately after the sale, the tenants of P. D. Mickles attorning and paying the rent to him. P. D. Mickles, who was examined as a witness, testified that when he heard of the sale, which he supposed was by virtue of the mortgage executed by the plaintiff, he told Wheaton he was very glad of it. He understood that the premises sold for enough to pay the

mortgage, and he considered the matter settled, and that Wheaton had obtained a perfect title. The purchasers of the premises under Wheaton took possession at the time of their respective purchases. There was a brick building on the lot, which was erected by P. D. Mickles in 1842 or 1843. It was about nineteen feet wide, thirty-five feet long and two stories high. After Dillaye purchased, and in 1852, it was found that the old building was in a dilapidated condition, and was ready to fall down. The walls were badly cracked, particularly the one in the rear. It could have been repaired at an expense of about \$250, by taking down the rear and one of the side walls and rebuilding them. Dillaye caused it to be rebuilt and enlarged, at an expense of about \$5000, increasing its length to seventy feet, preserving one of the walls and the floors, and making use of the old materials so far as they would answer. He covered it with a tin roof, and put in gas and water pipes. He then rented it in its improved condition.

The referee found the foregoing facts in substance; and stated that the improvements made by Dillaye were permanent and valuable and were made by him in the full belief that he was the absolute owner of the premises. He added that it appeared from the evidence that while the improvements were making, the plaintiff was absent from the county of Onondaga and that there was no evidence that he was aware of the fact while the improvements were progressing. In matter of law he determined that the plaintiff was not obliged to allow anything on account of the rebuilding beyond what it would cost to repair the old tenement. He proceeded to state the account, charging the plaintiff with the mortgage debt and interest, the repairs estimated upon the principle above stated, premiums of insurance and taxes, and the interest on these last items, and crediting him with the rents received, but without including the increased rent on account of the rebuilding, and making due from the plaintiff, to be paid on the redemption, \$1885.99. The defendants excepted. Judgment was rendered, allowing a redemption upon the payment of that sum according to the report, which was affirmed at a general term in the fifth district. The defendants appealed.

DENIO, J. The right of a mortgagor who has made default in the payment of the mortgage debt according to his contract, and especially where the mortgagee or his assigns has lawfully acquired the possession, is in equity, and not a strict legal right. It would be impossible for the plaintiff to obtain possession of these premises by any suit or proceeding known to the law, except a suit in equity. When the mortgagor comes into a court of equity in such cases to redeem, he must do equity to the mortgagee, or the court will con-

sider the estate absolute in the latter; and the redemption, when allowed, will be decreed either absolutely or under certain conditions according to the nature and justice of the case. (Powell on Mortgages, 387, 388.) In conformity with this idea of the nature of the equity of redemption, the Court of Chancery has always obliged the mortgagor to submit to equitable conditions. It was formerly held, for example, that if the mortgagor, after giving the mortgage, had borrowed a further sum of the mortgagee, the latter was not obliged to submit to a redemption until both debts should be paid (*id.*, 391, 392). The tendency of modern decisions has been to limit and define the power of the mortgagee to insist upon conditions to the redemption. It is by no means intended to state there is any unlimited discretion in courts of equity to compel the owner of an estate bound by a forfeited mortgage to do whatever may in a popular sense and without regard to legal precedents be considered equitable in the particular case. It is, however, useful to bear in mind the origin and true character of the right of redemption, when called upon to determine a case not falling within any settled course of adjudication. It is still the rule that the mortgagor seeking to redeem must do equity to the mortgagee, or those who have succeeded to his rights; and where it has not been settled what is equity under the circumstances which attend a given case, the court must determine it according to its own sense of what is morally just and right.

Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time call upon the debtor, by suit of foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is therefore understood to be that upon taking the account in a suit for redemption against a mortgagee in possession, he is to be charged with the rents and profits, and be allowed only for necessary reparations. (*Moore v. Cable*, 1 John. Ch. R. 387; *Quin v. Brittain*, 1 Hoffman's Ch. R. 353; *Story's Eq.*, § 1016.)

So if the mortgagor, having in fact only a redeemable estate, should, even in good faith, deny the mortgagee's equity, this ought not to prejudice the latter, provided he had done nothing to mislead the mortgagor, and had not unreasonably slept upon his rights. In order to apply the cases in which permanent improvements have

been allowed to be taken into the account, it is necessary to have a clear view of the situation of these parties at the time the improvements were made. The defendant Dillaye was in possession as owner under a deed with warranty from a person in possession holding a similar evidence of title from one who had purchased the premises at a sale made professedly upon the foreclosure of a mortgage executed by the true source of title, and who had taken possession under that foreclosure. It is easy to see that an examination, such as a very cautious man would have made, would have shown the invalidity of the foreclosure. But the omission to make an examination was not such gross negligence as to charge the defendant with bad faith. He cannot claim that the estate is irredeemable because he supposed it to be so; but he is not deprived by his omission to examine, of the position of a person acting in good faith without actual notice. The referee has found, what could not be doubted upon the evidence, that he believed himself to be the absolute owner of the lot. But the plaintiff had very materially aided him in coming to this conclusion, or rather, he had suffered him to fall into that error, by an unjustifiable breach of his own obligation. His mortgage was executed in March, 1844. One-fourth of the principal and one year's interest were payable in about one year thereafter, and the whole debt was payable on the 1st day of June, 1845. He was in default for a portion of the debt for eleven years, and the whole amount of principal and interest had been in arrears more than seven years when this suit was commenced. He had not paid the smallest amount, and so far as appears, had never during that period recognized his indebtedness. Conceding, as we must do upon this case, that the sale by P. D. Mickles to the plaintiff, and the giving back of the bond and the mortgage sought to be redeemed was a real and not a colorable transaction, the plaintiff was in possession, up to the sale upon the foreclosure, by P. D. Mickles as his servant or agent or as his tenant. This possession was voluntarily abandoned and given up to Wheaton upon his purchase after foreclosure sale, and the latter immediately entered upon the reception of the rents and profits as owner, and he and those who succeeded him have continued to possess the premises as owners, unchallenged and without actual knowledge of this right of redemption, until shortly before the commencement of this suit, a period of eight years. When Dillaye erected the building, he and those who had preceded him in the title under the supposed foreclosure had been in possession as owners about six years. It is not found by the referee that the plaintiff was ignorant that his agent or tenant had been put out of possession upon pretence of the old mortgage, or that Wheaton and his grantors

were in possession, claiming as owners under that proceeding; and considering that the premises lie in one of the most considerable interior towns, and upon the great thoroughfare through the state, it is no wise probable that he was ignorant. The referee finds indeed that he was not aware of the improvements while they were going on. This is not inconsistent with a full knowledge that his tenant had yielded up the possession to a party claiming the absolute title, and that the occupants were in possession, believing themselves to be the owners. The fact probably is that both parties acted in ignorance of their rights. The old mortgage is claimed to have been extinguished by the operation of a technical rule of law. Had it remained on foot the right to redeem both mortgages would not have been of much if any value until the defendant had improved the premises by the expensive erection which he put upon them. If the plaintiff was not aware of the extinguishment of the old mortgage he would naturally have considered his interest as nominal; and this, I am persuaded, is the explanation of his long inaction. The case, when Dillaye erected the building, was this: he really had the title of a mortgagee in possession, but he supposed he was the absolute owner. The plaintiff had in fact an equity of redemption, but he had abandoned the possession to the defendants, who entered as owners; and he had ceased to claim any interest in the lot. He now finds that he has a valuable equity of redemption; and the question is whether he ought to pay for the improvement as a condition to the redemption. It was necessary that Dillaye should make expenditures to a considerable amount to render the premises tenantable at all; but he laid out more than was strictly necessary, though not more than would have [been] judicious had he been, as he supposed he was, the owner. In *Benedict v. Gilman*, 4 Paige, 58, the plaintiff had purchased under a statute foreclosure which did not cut off the rights of judgment creditors whose lien was subsequent to the mortgage, and had taken possession; and he had made permanent improvements in ignorance of the existence of certain judgments in the hands of the defendants. He filed a bill, claiming a strict foreclosure unless the defendants would pay up the mortgage and the value of the improvements, and this was decreed. The chancellor said it would be inequitable and unjust to give the defendants the benefit of these improvements without compelling them to pay an equivalent therefor. The defendant's case in the present controversy is much stronger than the plaintiff's in *Benedict v. Gilman*, inasmuch as the judgment creditors had done nothing to mislead the party in possession, and the negligence of the latter in omitting to search for subsequent incum-

brances was at least as great as that of Dillaye in this case. Judge Story has carried the rights of a party in possession, who has in good faith made improvements, altogether beyond what would be necessary to protect the defendant in this case. He says generally that courts of equity have extended the doctrine to cases where the party making the repairs and improvements has acted *bona fide* and innocently and there has been a substantial benefit conferred on the owner (Treatise on Eq., § 1237); and he has carried the principle into practice in a case decided by him in the Circuit Court of the United States. In *Bright v. Boyd*, 1 Story, 118, lands had been sold by an administrator, but the sale was void because he had not given security according to the statute. The heir of the intestate had sued for and recovered the possession against the plaintiff, who derived his title under the administrator's sale. The latter filed a bill in equity in the Circuit Court of the United States to recover of the heir the value of certain improvements which he had in good faith made upon the land, and which included the building of a large dwelling-house. The heir was an infant, and resided in another state; but Judge Story, notwithstanding, referred the case to a master to take an account of the enhanced value of the premises, deducting the rents and profits, with a pretty strong intimation that the plaintiff was entitled to recover them, though he said he would look into the case again upon the coming in of the report. This conclusion could not probably be sustained except upon the principle that one who fraudulently stands by and sees another expending money in good faith upon his land, shall not reclaim the land without paying for the improvements. Chancellor Walworth, I think, laid down the true principle in *Putnam v. Ritchie*, 6 Paige, 390. He decided in a case very similar to that which was before Judge Story, that where there was no fraud or acquiescence on the part of the person having the legal title, he could not be compelled, even in favor of a party in possession who had made improvements *bona fide*, to allow for such improvements; but he said that such allowances were constantly made by courts of equity where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another, who was obliged to resort to the court for relief. This, as we have seen, is precisely the case now before the court.

In *Welmore v. Roberts*, 10 How. Pr. R. 51, the question we are now considering was examined in the Supreme Court by Mr. Justice Hand, with his accustomed industry. It was a suit for foreclosure by a junior mortgagee, the defendant having purchased the premises from one who had bid them in upon a foreclosure of the elder

mortgage, in which proceeding the junior incumbrancer was not made a party. It was alleged that the defendant had made improvements in good faith, of the value of \$6000, and it was decided that the premises should be sold, and that the value of the permanent improvements as well as the amount due on the elder mortgage should be paid out of the proceeds; after which the plaintiff was to be paid the amount due on his mortgage. I refer to the authorities relied on by Judge Hand, and also to *Talbot v. Braddill*, 1 Vern. 184, and to Coote on Mortgages, pp. 392, 561.

I am clearly of opinion that the refusal to allow for the erection of the building was erroneous. The judgment of the Supreme Court should be reversed, as respects the account stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillaye, in which the latter should be allowed for the enhanced value of the premises on account of the improvements made by the defendants. In other respects, the order should direct the usual allowances between mortgagor and mortgagee on a bill for redemption.

HARRIS, J. The plaintiff acquired his title to the premises, such as it is, in March, 1841. The purchase price is said to have been \$4000. Of this, no part was ever paid. The plaintiff executed his bond and mortgage for \$2000, and, as Philo D. Mickles, the grantor, now testifies, it was agreed that the remaining \$2000 should be applied upon a note which the plaintiff held against him. There was no written evidence of such an agreement, and the indorsement was, in fact, never made. At the time of the conveyance the Fitch mortgage was an outstanding incumbrance upon the premises, and yet no provision was made for its payment, nor did the plaintiff in any way protect himself against this incumbrance, except by the covenant of warranty in his deed. Indeed, it does not appear that the plaintiff ever so much as inquired whether the property was incumbered or not.

For five years, and more, after the conveyance, the grantor continued to possess and enjoy the premises, as he had before. He received rents in his own name; paid taxes and assessments; made improvements; and, in short, held himself out to the world as the absolute owner. There is no evidence that the plaintiff ever claimed to be the owner, or that Philo D. Mickles ever, by word or act, recognized his ownership.

At the time of the foreclosure of the Fitch mortgage, in 1846, the amount due upon the two mortgages was at least equal to the value of the premises. Certainly, it exceeded the purchase price mentioned in the plaintiff's deed. Philo D. Mickles was then insolvent. There was no inducement, therefore, for the plaintiff or

Philo D. Mickles to prevent a foreclosure by paying off the mortgages. Upon the foreclosure, the defendant Wheaton, who had then become the owner of the second mortgage, became the purchaser, and thus, had the foreclosure been perfect, both mortgages would have been satisfied. Wheaton would have become the owner of the premises, but at a cost probably exceeding their value at that time. After the sale Philo D. Mickles inquired of Wheaton whether the premises had brought enough, and, upon being informed that they had been sold for the amount of the mortgage, he expressed his gratification that the matter was settled.

Wheaton, as purchaser, went into possession, and soon after conveyed the premises by deed, with warranty, to the defendant Robinson, who held the premises about four years and then sold to the defendant Dillaye. The latter, in 1853, "in the full belief that he was the absolute owner," as the referee has found the fact to be, proceeded to make "large and permanent and valuable improvements upon the premises, costing some \$5000, more or less." The property being thus doubled in value, it became an object for the plaintiff to assert his right of redemption. Accordingly, after sleeping upon his rights, such as they were, for nearly thirteen years, he commenced this action in 1854, claiming the right to redeem; and the question presented is whether, assuming the right, any compensation shall be made to Dillaye for the large improvements he has made.

All will agree, I think, that the plaintiff presents a case which entitles him to no greater degree of favor than the established rules of equity applicable to this case entitle him to demand. "I should have been glad," says Mr. Justice Allen, in pronouncing the judgment now under review, "to have found some principle upon which the defendants, who have, in perfect honesty, expended their money to a large amount in the permanent improvement of the property, by which its value and productiveness have been and are greatly enhanced, could be reimbursed, at least to the amount of the rents and profits which they had received." We are therefore to consider whether the plaintiff stands upon any legal right which precludes the court, in granting the relief for which he applies, from doing substantial justice between the parties.

I admit the general rule to be that, where the simple and acknowledged relation of mortgagor and mortgagee in possession exists, the latter will not, upon redemption, be allowed for general improvements made without the acquiescence or consent of the mortgagor, especially if the improvements tend to cripple the power of redemption. *Moore v. Cable*, 1 John. Ch. R. 385, was such a case. The assignee of a mortgage, without calling upon the mortgagor

or attempting to foreclose the mortgage, chose to take possession of the mortgaged premises, which consisted of wild lands, and had a part of the land cleared. The claim of the mortgagee to be allowed for what he had thus expended, was rejected. In noticing this case in his Commentaries, Chancellor Kent says: "The clearing of uncultivated land, though an improvement, was not allowed in *Moore v. Cable*, on account of the increasing difficulties it would throw in the way of the debtor to redeem. But," he adds, in the same connection, "lasting improvements in building have been allowed in England, under peculiar circumstances, and they have sometimes been allowed in this country, and sometimes disallowed." (4 Kent Com. 167.) In a note at the same place it is further added that "all the cases agree that the mortgagee is to be allowed the expense of necessary repairs, and beyond that the rule is not inflexible, but it is subject to the discretion of the court, regulated by the justice and equity arising out of the circumstances of each particular case." Accordingly, in a recent English treatise (Coote on Mort. 354) it is said to be the duty of the mortgagee in possession to keep the premises in repair, and he will be allowed the charge of permanent improvements. And Hilliard, in his Treatise on the Law of Mortgages, after noticing the general rule on the subject, says: "The rule refusing the allowance of lasting improvements has been subjected to some exceptions in special cases, as where the mortgagee makes such improvements supposing himself to be the absolute owner." In support of this proposition he cites the language of the chancellor of Maryland in *Neale v. Hagthorp*, 3 Bland Ch. R. 590, where it is said: "If the mortgagee has been long in possession, claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them." (Hilliard on Mort. 297.)

In the case before us, the premises had been held, under the statute foreclosure of 1846, for more than six years before Dillaye purchased. The possession had been continued and undisturbed. The silence of the plaintiff for this long period had encouraged the belief that those who had the property in possession were the true owners. Dillaye purchased, not as the assignee of the mortgagee, but believing that he was acquiring the property as his own. He made the improvements never doubting that he was the absolute owner. The referee has not found that the plaintiff was ignorant of the fact that the premises had been sold upon the foreclosure, or that Wheaton and his grantees were in possession under that sale. All he finds on this subject is that "during the erection of the improvements the plaintiff was absent from Onondaga, and

there was no evidence that he was aware of the fact while the improvements were progressing." The plaintiff having so long acquiesced in the adverse possession of the premises, himself contributed to the mistake under which the defendants acted. Had no improvements been made, there is no reason to believe that he would ever have asserted his right to redeem. Under such circumstances, he should not be allowed, in a court of equity, to enrich himself at the expense of one who has acted innocently. The improvements are a substantial benefit to the property, and, if he would redeem, he ought, *ex æquo et bono*, to pay for them to the extent of such benefit.

The plaintiff has found himself under the necessity of resorting to a court of equity to enforce his right. He has thus placed himself within the range of that great principle, that he who seeks equity must himself do equity. The improvements were made in the full belief that the plaintiff had no right to the property. That belief has, to some extent, been induced by the apparent acquiescence of the plaintiff in the adverse possession of the defendants. If now the plaintiff, after so great delay, will assert his right to redeem, and invoke the aid of a court of equity to enforce that right, he should be required to make equitable compensation for the benefits he will receive from the improvements. To refuse such compensation, instead of doing equity, would produce the most revolting injustice. (2 Story's Eq. Jur., § 799, *id.*, § 1237.)

COMSTOCK and PRATT, Js., did not sit in the case; all the other judges concurring,

*Judgment modified and account ordered to be re-stated.*¹

¹ "When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of equity."—*Per Grover, J.*, in *Miner v. Beckman*, 50 N. Y. 338, 345 (1872).

The doctrine of the leading case is everywhere accepted, the improvement being reasonable and "judicious." *Gillis v. Martin*, 2 Dev. Eq. (N. C.) 470 (1833); *McConnel v. Holabush*, 11 Ill. 61 (1849); *McSorley v. Larissa*, 100 Mass. 270 (1868); *Harper's Appeal*, 64 Penn. St. 315 (1870); *American Buttonhole Co. v. Burlington Loan Assn.*, 68 Iowa, 326 (1886). But see *Miller v. Curry*, 124 Ind. 48 (1889), in which it is curiously limited, and compare *Barnett v. Nelson*, 54 Iowa, 41 (1880).

McCUMBER v. GILMAN.

SUPREME COURT OF ILLINOIS, 1854.

(15 Ill. 381.)

Calvin McCumber, the ancestor of the complainants, on the fourth day of August, 1842, purchased from Joel Walker, lot two in block seven, in Walker's addition to Belvidere, for \$100, and took a bond for conveyance of the lot, on payment of the money in one and two years, with interest, payable annually, for which McCumber gave his notes. McCumber paid the first of these notes and a part of the other before his death. McCumber borrowed of Gilman \$600 in Illinois internal improvement script, drawing interest; to secure the repayment of which, with interest at three per cent. per annum upon the \$600, he gave his note and a mortgage on the lot in question. This note and mortgage were made after the last note given for the payment of the lot had become due.

On the 16th of August, 1845, McCumber died intestate, leaving a widow; and the complainants, his heirs, returned to probate court \$125, which was set off to widow. The estate owed debts, as proved, amounting to \$220, not including the notes to Walker and Gilman. The mortgage to Gilman was acknowledged and recorded in September, 1844. After death of McCumber, Gilman sued out *scire facias* to foreclose his mortgage, and took judgment in April, 1846, for \$240. The premises in question were sold on this judgment for \$393.07, and Gilman became the purchaser; the redemption expired, and Gilman took a deed from the sheriff. Walker, by order of a decree in chancery, conveyed the lots in question to Gilman. In the spring of 1849, Gilman made improvements on the premises by removing a wooden building, variously estimated from \$25 to \$100, and erecting a new building in its place; by laying new floors, putting on blinds, &c.

The decree was rendered by J. G. Wilson, Judge, at April term, 1854, of the Boone Circuit Court.

CATON, J. The case of *McCumber v. Gilman*, reported in 13 Ill. 543, disposes of all claim which the defendant could assert under the judgment of foreclosure, which was there reversed, and leaves him simply in the position of a mortgagee in possession for condition broken, and leaves nothing to be decided in this case except to determine how much he shall be entitled to for repairs or improvements which he has put upon the premises during his possession. The rule on this subject has been as well settled by this court as its nature will admit. It is not only the right, but it is the duty of the mortgagee in possession, to put upon the premises all necessary

and proper repairs to prevent them from going to waste, and to reimburse himself out of the rents and profits, unless, indeed, the condition of the premises would make it injudicious to make such repairs. Circumstances might exist where it would be better for the estate to abandon the improvements altogether, than to repair them. In such a case, the court could not sanction an expenditure thus injudiciously made. But the rule does not admit the mortgagee in possession to make new improvements at the expense of the estate; although circumstances may exist which will authorize the court, in stating the account, to allow the mortgagee for new improvements which he was in strictness not authorized to make at the expense of the mortgagor. (*McConnell v. Hobbush*, 11 Ill. 61.) In that case an allowance was directed to be made for new improvements, provided certain facts should be established upon a further hearing. The facts further to be established were indicated in the opinion of the court, as follows: "Were we convinced that the improvement was made in good faith, the defendants believing they had made a valid purchase of the premises, and that the expenditure was a judicious one for the benefit of the estate, we think they should be allowed for them." In this case there is no doubt that the improvements were made in good faith, the defendant believing that he had made a valid purchase of the estate, and that he was expending his money upon his own absolute property. He purchased it under a judgment of the circuit court foreclosing this same mortgage, and after the time allowed for redemption had expired he took a sheriff's deed, and we have no reason to doubt that he supposed his title good. Under this supposition he made the improvements, and with himself as owner, it may be very true that the improvements were quite judicious and proper. But it by no means follows that, counselling the estate as belonging to the heirs of McCumber, the new improvements were judicious and proper. Indeed it is very manifest that they were not, especially as to the new stone house which the defendant erected on the premises. The propriety of the expenditure must be determined with reference to the circumstances of the heirs of the mortgagor, for it was upon their estate that the improvement was made, and it is against them that the expense is sought to be charged. It is a very hard, if not an unjust rule, which in any case makes one a debtor against his will; and it is very clear that it should never be done, unless it is manifestly to his advantage, as well as just and proper as to the other party. Were we to consider the case of Gilman alone, there can be no doubt that he should be compensated to the extent of the enhanced value of the premises by reason of this expenditure; but when we consider the situation and circum-

stances of the complainants, there can be no doubt it would be great injustice to them to impose such a burden upon them. It would be equivalent to denying them any relief whatever. Their father died, leaving no estate whatever to these infant children except this house and lot, incumbered with this mortgage of about \$165, and leaving other debts amounting to about \$220. The value of the premises was about \$500, and were then worth about \$65 a year in rents, but were fast going to decay. The defendant took possession, and not only put the house which was on the premises in thorough, though not extravagant repair, but he put a new fence upon the lot, and removed a wooden kitchen which was attached to the back part of the brick house, and worth from \$25 to \$50, and in its place erected a new stone house, at an expense in the whole of about \$1,200, which he now insists the defendants shall pay him before they shall be allowed to redeem the premises from the mortgage which their ancestor agreed to pay him, and to satisfy which alone he had a right to take the possession. The case has to be but stated to show, that to allow it is equivalent to depriving the heirs altogether of their rights and interests in the premises; for it is perfectly manifest, that it is utterly out of their power to redeem the estate from the mortgage and to pay for these improvements. No court, and no judicious individual having charge of the estate and interest of these infants, could have sanctioned such an expenditure at the time it was made, knowing that it was to be charged to them when they should come to redeem, and knowing that they had nothing in the world with which to pay it. The improvements must have been proper and desirable as to them and in their circumstances, before they can be pronounced judicious and the estate charged with them. And at least as to the new house or addition, and the new fence, we are of opinion that the rules of law do not admit of their allowance. The defendant's claim for improvements is not a matter of strict right, and hence to determine its justness we must consider the position of the other parties; and when this is done, we see at once that to enforce a claim against them for benefits which have been volunteered to them, and to which they have never given the least encouragement, would, in all probability, deprive them of a clear right, without any fault or act of theirs. We are of opinion that the court erred in requiring the complainants to pay to the defendant the value of the new improvements which he placed upon the premises while they were in his possession. There is serious doubt whether even the repairs put upon the brick house were not more extensive than were strictly necessary to preserve the estate from waste and make it tenantable, and more than were strictly judicious, when we consider the cir-

circumstances of the complainants; but upon the whole we have thought it proper to direct that they should be allowed to the defendant in taking the account. I have looked through the evidence with some care, with the hope of being able to make up a satisfactory account between the parties, and thus save the expense and trouble of another reference, but find that I am unable to do so. Hence we must confine ourselves to laying down the principle upon which the account should be stated. The suit must be remanded, with directions that the defendant be allowed the value of the repairs placed upon the brick house alone, including the cellar and well, and also all taxes paid by him upon the premises, as well as the amount due upon the mortgage. The evidence in this record does not show that he has paid the balance due from McCumber for the purchase of the lot. Should he establish by proof that he made such payment, prior to the time when he obtained the title from Walker, he should be credited with the amount thus paid and interest thereon from the date of payment. If he has kept the property insured, for that he should be credited also. He should be charged with the value of the rent of the premises, exclusive of the new improvements which he has put upon them and for which he gets no allowance in making up the account. The value of the rent is to be estimated of the premises with the repairs for which he receives a credit. The rents to be applied in extinguishment of the taxes paid, repairs, &c., first, and, should any balance remain, then towards the interest due upon the mortgage, and then the principal; annual rests being made in computation. Or, if the amount paid for taxes, repairs, &c., should exceed the value of the rents, interest may be allowed upon the excess. No charge to be made for the wooden shed or kitchen removed.

The decree must be reversed, and the suit remanded, with directions to the Circuit Court to proceed conformably to the principles of this opinion.

Decree reversed.

MORGAN v. WALBRIDGE.

SUPREME COURT OF VERMONT, 1883.

(56 VT. 405.)

Bill in chancery to redeem certain mortgaged premises in the possession of the mortgagee. Heard on bill, answer and the report of a special master, March Term, 1883, Essex County. Ross, Chan-

cellor, decreed that the orator could redeem by paying \$329.81. The chancellor stated that in his judgment this case was exception to the general rule that a mortgagee in possession could not improve the mortgagor out of his estate.

The master found, that the balance due from the orator on the bank notes, money paid to Ingalls, etc., was \$229.81; that the use of the premises while occupied by the defendant was \$200; and that the value of the land was enhanced \$300 by reason of the improvements. It was a part of the decree below that the defendant, on payment of the \$329.81 by the orator, should deed back and surrender the bank notes which had not been fully paid. The other facts are stated in the opinion.

Bates & May for the orator.—The court will treat the deed as a mortgage. (*Wright v. Bates*, 13 Vt. 341; *Hills v. Loomis*, 42 Vt. 562.) The note which H. & W. signed as sureties is not at present paid. (*Reed v. Gannon*, 5 N. Y. 348; *Strike v. McDonald*, 3 Harr. & G. 191.) The improvements are not of such a character as to warrant an allowance of the same. The master makes no finding as to whether any of the improvements were reasonably necessary and proper; if not so found the court cannot infer that they were so. (*Saunders v. Frost*, 5 Pick. 259; 2 Jones Mort. 1129.) The charge for clearing the land is not allowable (*Moore v. Cable*, 1 John. Ch. 385; *Morrison v. McLeod*, 2 Ired. Eq. 108; 2 Kent Com. 334; *Sanders v. Wilson*, 34 Vt. 318;) nor the charge for building the barn. (*Russell v. Blake*, 2 Pick. 505; *Reed v. Reed*, 10 Pick. 398; *Beckman v. Wilson*, 10 Reporter, 554.)

Nichols & Dunnell, for the defendants.—Defendant concedes the general rule that a mortgagee cannot improve the mortgagor out of his estate; but this case is a plain and well-recognized exception to the rule. A mortgagee in possession making improvements upon the mortgaged premises in the belief that his title is perfect is entitled to remuneration for expense so incurred to an amount equal to the enhanced value of the premises. (*Howard v. Harris*, 2 Lead. Cas. Eq., p. 2011; *Whitney v. Richardson*, 31 Vt. 300; 2 Jones Mort. 1128; *Green v. Biddle*, 8 Wheat. 77; 4 Wait Act. & Def. 578; 2 Story Eq., s. 1237, n. 1; 2 Wash R. P., p. 229; *French v. Burns*, 35 Conn. 359.)

The opinion of the court was delivered by

POWERS, J. This is a bill to redeem certain mortgaged premises now in the possession of the defendant Walbridge as mortgagee, and encumbered by a mortgage executed by Walbridge to defendant Chase. The right of redemption as against Walbridge is conceded; and the master reports that Chase took his mortgage with notice of the orator's equity, and thus the right of redemption exists in

favor of the orator against him. The question in hand is, what shall the orator pay as the price of redemption?

Hill & Walbridge were sureties for the orator on sundry notes to various banks, and to indemnify his sureties, the orator, August 29, 1876, executed to them a quit-claim deed of the premises in question. This deed, though absolute in form, was in fact a mortgage, and an equity of redemption under it remained in the orator, to all intents and purposes, as complete and perfect as though it had been in form a mortgage. Hill & Walbridge failed, and, among other conveyances in the adjustment of their affairs, in the fall of 1876, conveyed the premises in question to Ingalls, in trust for their creditors;—Ingalls, however, taking such conveyance with notice of the orator's equity. In the spring of 1878, the orator was notified that Ingalls was about to sell said premises, and that the orator could have them for \$100. The orator declining to purchase, Walbridge, his co-surety Hill having died, procured one Tilton to take a conveyance and pay \$100, Walbridge furnishing the money. This conveyance was on April 23, 1878. This money was paid out for the orator's benefit on his notes upon which Walbridge was surety, and for taxes.

Dec. 9, 1878, Tilton quit-claimed the premises to Walbridge, and on the same day Walbridge mortgaged the same to defendant Chase. At the time of the conveyance to Hill & Walbridge by the orator, and until Walbridge made the improvements herein-after described, the land was of comparatively little value without a considerable expenditure of labor and money. The wood and large timber had been taken off, and it had run up to sprouts and bushes, so as to make it a difficult and expensive piece of land to clear. From the master's report it is apparent that the land was in no condition to yield any income, and could only be made valuable by being burned over, grubbed and fitted for cultivation.

Walbridge, after the orator declined to take a conveyance from Ingalls and pay \$100 (which the master finds was the value of the premises at the time), supposed, when Ingalls sold to Tilton, and Tilton to him, that he had secured a good title to the land, and the orator's equity of redemption was extinguished. Thereupon, in the belief that he had a good title, he went on and made permanent and valuable improvements upon the land, in the years 1879, 1880, 1881, and 1882. He cleared up the land, smoothed the surface, built fences, and erected a small barn. All his improvements were in kind and character, such as good husbandry required, such as alone made it valuable, and such as a prudent owner would have made. The orator knew of the improvements as they were from time to time going on, and made no objection thereto, and asserted

no right or wish to redeem until the summer of 1881, when, through O. F. Harvey, he communicated to Walbridge his desire to redeem. In March, 1882, the orator offered to pay Walbridge \$125, and called on him for a deed. At this time, and when Harvey interviewed Walbridge in 1881, the improvements had been substantially all made, costing Walbridge about \$375, and enhancing the value of the premises, as the master reports, \$300.

Are these improvements chargeable to the orator on redemption?

The general rule is conceded, that a mortgagee in possession without foreclosure cannot improve the mortgagor out of his estate. The mortgagee is not in possession as owner, but as a quasi trustee, to keep the premises in proper repair, carry them on according to the rules of good husbandry, and apply the rents and profits to the extinguishment of his mortgage debt. As a general proposition, lasting improvements cannot be made at the expense of the mortgagor, if he elects to redeem. But it is a rule of general application in courts of equity that he who *seeks* equity must *do* equity. It is obvious that the orator had no interest to redeem the premises before the improvements were made; and, upon foreclosure brought, he would, doubtless, have declined to redeem. He had declined to take the title at the actual value of the land. It was only after the improvements had made the land of productive value that he discovered a wish to redeem. He was not improved *out* of an estate, but was improved *into* one. He stood by in silence, and saw the improvements going on, and now, when the land has been made of practical value, seeks to reap the benefit of such improvements by paying its original value with interest. This proposition is too unrighteous to meet the approval of a court of equity. The case is not that of a farm already in a condition to be carried on, like *Sanders v. Wilson*, 34 Vt. 318; nor that of wild land, like *Moore v. Cable*, 1 Johns. Ch. 385; but it is the case of land partially subdued, requiring further expenditure to bring it to productive value. The rule forbidding an allowance for permanent improvements is not an inflexible one, but is suspended in exceptional cases, if justice and the equity of the case require it. (4 Kent Com. 167 and note.) Such allowance has been made where the mortgagee has acted in good faith and under the mistaken notion that the right of redemption has been barred (*Benedict v. Gilman*, 4 Paige, 58); and where the mortgagor has been slow to act and has thus led to a false impression by his silence (*Mickles v. Dillaye*, 17 N. Y. 80); and where the mortgagee makes the improvements supposing he is the absolute owner (*Hill, Mort.* 297); and where the mortgagee has been long in possession and suffered to treat the estate as his

own, and the mortgagor stands by and in silence permits the improvements to be made (*Neal v. Hagthorp*, 3 Bland Ch. 590).

When the mortgagee has been lulled into the belief that the right of redemption has been barred or abandoned, and the mortgagor, knowing, or having reason to believe, that the mortgagee supposes that he is the absolute owner, stands by and sees the mortgagee make lasting improvements upon the land, in kind and character such as the land in its condition and wants clearly requires, and which are obviously sanctioned by the usages of good husbandry and faithful stewardship, then the right to redeem will be burdened with the expense of such improvements.

This rule is well fortified by authority, and is securely grounded in reason and justice; and this case is one proper for its application.

*Decree affirmed.*¹

(b) *Rents and Profits—Annual Rents.*

ANONYMOUS.

HIGH COURT OF CHANCERY, 1682.

(1 *Vern.* 45.)

A mortgagee shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

HUGHES v. WILLIAMS.

HIGH COURT OF CHANCERY, 1806.

(12 *Ves.* 493.)

Exceptions were taken by the defendant, a mortgagor, to the Master's report: first, that the Master had charged the plaintiff, a mort-

¹ Valuable and lasting improvements *allowed out of the rents and profits* if made with the knowledge of mortgagor and without objection from him; *Montgomery v. Chadwick*, 7 Iowa 114 (1858).

gagee in possession personally, and by a receiver under his appointment, with the rents actually received: whereas he ought to have been charged, according to the circumstances in evidence, with the improved rents, at which the estates had been since let by the receiver appointed by the Court, and which ought to have been obtained by the plaintiff, or his receiver, but for their wilful neglect or default. Another exception was, that the Master had allowed the plaintiff the sum of 68*l.* for the expense of opening a slate quarry: the defendant contending that it was an illegal and improper act; and the only benefit accruing to the estate thereby being the sum of 2*l.* charged to the plaintiff's account, as the produce of the slates. The defendant was out of possession long before the plaintiff entered, prior mortgages having been in possession, whom he paid, to prevent foreclosure.

THE LORD CHANCELLOR [LORD ERSKINE]. I do not mean to say that to charge a mortgagee in possession actual fraud is necessary. It is sufficient if there is plain, obvious and gross negligence, by not making use of facts within his knowledge, so as to give the mortgagor the full benefit that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was under-let, takes a new tenant, another person offering more; an offer, however, not to be accepted rashly. But this case does not furnish even that ground; for with the exception of a proposition to give 7*l.* a year for one tenement, instead of 5*l.* a year, the rent then paid, there is no proof of any proposal for an increase. A reason also is assigned for not accepting the proposal in that instance; that the tenant was in arrear, and the plaintiff was apprehensive of losing that arrear; and there is more difficulty where the estate consists of a number of distinct tenements.

Another circumstance that weighs with me is that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance not only such notice was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be.¹ Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to

¹ Compare *Moshier v. Norton*, 100 Ill. 63, 72 (1881).

the principle that has been stated by the Solicitor-General, that it would be dangerous to say the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shewn as comes up to the description of wilful default, he ought to be answerable for it.

But I determine this exception upon the principle that a mortgagee, taking possession, is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor, but is liable only for wilful default, of which in this instance there is no pretence, this mortgagor not having even communicated that he had any contemplation of improvement or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more, which was never communicated.

Upon the same principle on which I determine the first exception in favour of the mortgagee, I must determine the other exception against him. The principle is the safety of mortgagees. The line cannot be drawn. How can it be ascertained that the mortgagor will want a slate quarry? The amount is in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must speculate at his own hazard.

The first exception was overruled, and the other allowed.

FELCH v. FELCH.

COURT OF CHANCERY OF VERMONT, 1845.

(9 *Law Rep.* 217.)

This was a bill of foreclosure against the mortgagor and others, subsequent incumbrancers. The bill was taken as confessed, under a rule that the defendant should have the same right to call the plaintiff to account before the master for all rents and profits of the mortgaged premises, for which he was liable, as if the defendants had filed a cross bill; and that the plaintiff in his turn should have the same rights in accounting as if he had made answer to the cross bill. It was accordingly referred to one of the masters of the court to state the sum due in equity. The only questions raised upon the master's report were in regard to the liability of the plaintiff for rents and profits while he had been in possession of the premises during the last year. In regard to this the master re-

ported the following facts: The plaintiff, before he took possession of the premises, which consisted of a farm and small tenement, brought ejectment against the mortgagor, and recovered judgment for the seisin and possession of the premises, which the mortgagor having abandoned, the plaintiff took possession, and personally occupied the land and cultivated it in such manner as he best could, living at some distance from it, and having no opportunity to rent the house. The master reported that in consequence of the plaintiff's living at some distance from the premises and conducting his agricultural operations at some disadvantage on that account, and not occupying the house, he did not derive as much benefit from the use as what would be considered a reasonable rent for the premises for one who resided thereon, and referred it to the court to determine for which of two sums so fixed the plaintiff was liable in equity.

After argument by *Paddock* for the plaintiff and *Underwood* for the defendants

THE CHANCELLOR, REDFIELD, delivered the following opinion:

The importance of this question, rather than the amount here involved, and the consideration that bills of foreclosure are not ordinarily appealable from this to the Supreme Court, has induced me to examine this case with more care than I should otherwise have done. I think it obvious that the mortgagee, under the circumstances of this case, cannot be made liable for anything more than the *actual profits*. And this, I think, may be shown by the oath of the plaintiff in support of his account of disbursements and receipts. For in regard to the rents and profits of the mortgaged premises, while he occupied them he is strictly a defendant, and the accounting party. The regular course in such case would be for the defendants to file a cross bill, calling upon the plaintiff to state the amount of rents and profits, which strictly he should do in his answer to such cross bill; but the same result was here attained by the rule under which the bill was taken as confessed.

But the defendants objected not only to the mode of trial before the master, but also that the plaintiff should, while personally occupying the premises, be made liable for a *reasonable rent*, without reference to his actual receipts. This latter objection deserves a more extended consideration, perhaps, in consequence of its general importance.

1. Upon principle it is difficult to perceive why the mortgagee, who takes possession of the premises while vacant, and long after his debt becomes due, should be held to any stricter accountability than other trustees. It is the fault of the mortgagor, in the first instance, that the debt is not paid, and that in consequence

the mortgagee is compelled to take possession. 2. It is contrary to the contract of the parties, and to the ordinary expectation in such cases, that the mortgagee should be compelled to resort to the land for the payment either of his debt or interest. 3. If there are subsequent incumbrancers, who are ultimately and principally interested in the avails of the security, it would seem more their duty than that of the first mortgagee either to remove the first incumbrance, and thus take the control of the premises, or else to find a tenant who will render a reasonable rent. Under such circumstances, to require of the plaintiff more than ordinary diligence would seem manifestly unreasonable and unjust. In ordinary trusts the trustee is held only to common diligence, or such as men ordinarily exercise in their own affairs, and to account in that way for the profits actually received from the trust estate, or which might have been received but for the neglect of such common diligence.

In looking into the books I think no doubt can be entertained that such has been the general rule in regard to mortgagees in possession ever since the time of the case in 1 Vernon, 45 (1682), which as it is very brief, and seems to form the basis of the subsequent decisions upon the subject, may be here excused. "A mortgagee shall not account according to the value of the land, viz.: He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his wilful default; as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it." There is in the present case no pretence that the plaintiff turned out or rejected a tenant, or that one could have been found, or that, under the circumstances under which he came on the premises, he could have realized more than he did. He must, then, I conclude, according to the case from Vernon, be liable only for what profits *he actually did receive*. This case is followed almost in terms by Ch. J. Swift, 2 Dig. 193, 2 Powell on Mort. 272; by Chancellor Kent, 4 Comm. 166, and in *Hughes v. Williams*, 12 Vesey, 493, and in Mr. Perkins's note to this last case, where all the modern authorities are collected and digested. That this is the general rule of the liability of trustees cannot be denied. The exceptions to this rule, where trustees have been made liable for rents and profits which they *might* have received but for their own wilful default, will not affect the present case. (*Loftus v. Swift*, 2 Scholes & Lef. 656; *Duke of Buckingham v. Gayer*, 1 Vernon, 258; *Chapman v. Tanner*, *Id.* 267; *Coppring v. Cooke*, *Id.* 270; *Williams v. Price*, 1 Simons & Stuart, 581.)

The cases which have been cited to show that a mortgagee who

personally occupies the premises, is liable for a reasonable rent are not like the present. Where the premises consist of a tenement and out buildings which are occupied by the mortgagee, or where the mortgagee refuses a tenant who will pay a reasonable rent, no other rule could be adopted but to make *him* accountable for a reasonable rent; so also he should be accountable for a reasonable rent when he manages the premises unskilfully by reason of which they become unprofitable to him. (*Van Buren v. Olmstead*, 5 Paige, 9; *Bainbridge v. Owen*, 2 J. J. Marshall, 465). And in some cases, when the premises had suffered deterioration while in the possession of the mortgagee by his default, such damage has been ordered to be deducted from the mortgage debt. (*Kennedy v. Baylor*, 1 Washington, 162). But none of these exceptions affect the present case. The orator is entitled to a decree for the amount of his mortgage debt, deducting the amount of profits actually received by him.¹

SHAEFFER v. CHAMBERS.

COURT OF CHANCERY OF NEW JERSEY, 1847.

(2 Halst. 548.)

THE CHANCELLOR [HALSTED]. On reading the testimony, I do not see any good reason why the report of the Master should not be confirmed. A mortgagee, by taking possession, assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use. If it be a farm, he is not at liberty to let it lie untilled because the house on it, or the house and farm together, were not rented. I see no reason why the farm should not be husbanded, though the buildings on it were not rented. Again, a mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair; and if it be a farm he is bound to good ordinary husbandry.

It appears by the testimony that, for several years of the time during which the defendant has been in possession, the property was not rented, and the whole of it, farm and all, was permitted to lie uncultivated. The Master reports that it was not made

¹ The authorities generally are accord: *Robertson v. Campbell*, 2 Call (Va.) 421 (1800); *Hogan v. Stone*, 1 Ala. 496 (1840); *Gerrish v. Black*, 104 Mass. 400 (1870); *Moshier v. Norton*, 83 Ill. 519 (1876); *Moshier v. Norton*, 100 Ill. 63 (1881).

satisfactorily to appear to him that the property was thus unoccupied without the default of the defendant. The ground here taken by the Master raises this question: a farm of 85 acres, 25 of it in wood land, under mortgage, is taken possession of by the mortgagee and rented. He remains thus in possession a number of years. Occasionally during this period the premises are vacant and the farm untilled. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them; or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in 1 Vern. 45; or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Champion*, 1 Moll. 238.

It seems to me that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But, at all events, if the farm and buildings are not rented he ought to cause the farm to be tilled, and that in a husbandlike manner.

From the testimony I think the defendant has been negligent, to say the least, in the manner in which he has treated the premises. No provident owner would have treated them as he has. They have been permitted to go greatly out of repair, and the lands have been so badly husbanded that for several of the last years the whole premises, rented at first by the mortgagee for \$100, have rented for only \$60, and he has been charged but that sum. The defendant, during several years, cut wood and timber from the premises and sold it. The Master, in stating the account, made annual rests when he found that the wood and timber and the rents and profits exceeded the interest and expenses, and applied the income, first, to the interest and expense account, and then to the reduction of the principal. This was objected to on the part of the defendant. It seems to me the Master was right.

I am satisfied with the general result reached by the Master.

Exceptions disallowed.¹

¹*Van Buren v. Olmstead*, 5 Paige (N. Y.) 9 (1834), accord. Compare *Dexter v. Arnold*, 2 Sumn. 108, 129 (1834); *Miller v. Lincoln*, 6 Gray (Mass.) 556 (1856); *Richardson v. Wallis*, 5 Allen (Mass.) 78 (1862); *Sanders v. Wilson*, 34 Vt. 318 (1861), and *Barnett v. Nelson*, 54 Iowa, 41 (1880).

PARKINSON v. HANBURY.

HOUSE OF LORDS, 1867.

(L. R. 2 H. L. 1.)

THE LORD CHANCELLOR [LORD CHELMSFORD]:—[His Lordship stated the facts and history of the case and the decree therein, and then proceeded as follows:]

The appellant is the administratrix of her father, John Farrell Parkinson, who died on the 6th of October, 1831. He was the lessee of the Royal Oak public house, under a lease for a term of fifty-three years from the 29th of September, 1819. On the 26th of May, 1823, he mortgaged the Royal Oak and the eight houses in Radnor Street to a person of the name of Thomas Chambers for a sum of £2000, and that mortgage deed contained a power of sale, which was to be exercised by Chambers, on giving three months' notice to the mortgagor, his executors, or administrators. On the 10th of January, 1828, the Royal Oak was assigned by Parkinson to Thomas Butts Aveling for the defendants, Truman, Hanbury & Co. as the security for a sum of £735, and interest due to them. That deed contained a proviso for redemption, and was clearly a second mortgage of this property. There was a trust conferred upon Aveling to sell or to let the premises, and out of the proceeds of the sale to pay the mortgage to Chambers of £2000, to pay a sum of £735 and interest to the defendants, and to pay the surplus, if any, to the estate of Parkinson.

In the month of May, 1828, Parkinson was embarrassed and in difficulties, and unable to carry on the Royal Oak public house; and he agreed, on receiving a sum of £50, to give possession of the house and other properties which he possessed to the defendants, who were to act as his agents, to collect the rents and to let the properties.

Parkinson died intestate in October, 1831. On the 7th of June, 1834, Hanbury & Co. delivered up the possession of the premises, which up to that time they had held under these documents, and rendered accounts of the income and outgoings. The appellant made some objections to some of these accounts; answers were sent to her objections, and she made no observation in reply. What occurred between the date of June, 1834, and the 9th of October following did not clearly appear in evidence. On the 9th of October, 1834, the executors of Chambers, under the power of sale contained in the mortgage to him, sold the property to Hanbury & Co. for the sum of £1300, a sale which was afterwards declared to be

invalid, because it was effected without the three months' notice required by the power of sale contained in the mortgage.

After the execution of the deed of sale, Hanbury & Co. received on the 29th of November, 1834, the half-year's rent due at Midsummer, and on the 10th of February, 1835, the rent due at Michaelmas, 1834, but in what character did not distinctly appear. At this period, and for some time afterwards, there was no legal personal representative of Parkinson. In February, 1845, the appellant took out letters of administration to her father, and in 1848 she filed her bill, alleging (but without specifying items) that the accounts rendered were erroneous, that the respondents had not rendered accounts of the goodwill and profits of the business of the Royal Oak, and praying that the respondents (whom she treated as mortgagees in possession) should render in that character accounts of what they had received, or what, but for their wilful default, they might have received. In 1852 she filed a similar bill, and in 1854, on her own application, the bill of 1848, which the respondents had duly answered, was dismissed. The bill filed in 1852 (amended in August, 1858, and re-amended in December, 1858) prayed for an account of what was due to the respondents on their security of January, 1828, or otherwise charged upon the mortgaged premises in the bill mentioned, that they might be decreed to account for the profits of the Royal Oak, and of the goodwill of the business thereof, received by them or their agents, or which, without their wilful neglect or default, might have been received by them from June, 1828, up to the filing of the bill; and that they might account for the rents and profits of the houses in Radnor Street and Waterloo Street up to the time when the same were taken possession of by Chambers, or to such farther time as the Court might deem fit; also of the timber yard and tenements adjoining, and of the houses in Galway Street and the ground in Cop-pice Row. And that it might be declared that, notwithstanding the conveyance and assignment of the Royal Oak by Chambers to the respondents, they were trustees or mortgagees thereof—and that the appellant was entitled to redeem the same, and all the other premises then in the possession of the respondents—and for the usual orders thereon, and for farther relief.

The respondents put in their answers, affirming the correctness of the accounts delivered, alleging that they had collected the rents in the character of agents, and denying that they ever had received, or been entitled to receive, anything for the goodwill and profits of the business. The cause came to issue, evidence was taken, and it was heard before Vice-Chancellor Kindersley, who on the 7th of

June, 1860, made his decree, by which the bill was ordered to be dismissed with costs, as to the relief sought to be obtained thereby in respect of all property in the pleadings mentioned, except the Royal Oak, as to which it was ordered that an account should be taken of what was due in respect of the security of January, 1828, or otherwise charged upon the mortgaged premises, and for the costs of the suit; and that an account be taken of rents and profits received by the respondents from the 1st of June, 1828, to the present time; and that, upon the appellant paying to the respondents the principal, interest, and costs, after such deductions, and giving credit to them for £1300 and interest from the 9th of October, 1834, they should re-convey, &c. But in default of her making such payment the bill was to be dismissed with costs.

On appeal to the Lords Justices, they on the 15th of January, 1865, affirmed this decree with costs.

This appeal was then brought.

It is against this decree that the present appeal has been brought, and the reasons given for the appeal are: First. "Because by the amended bill of complaint the appellant set out specific charges as being erroneous, and is, therefore, entitled to open such account, even if it was ever closed or settled, and thus obtain an account of the rents received for and in respect of the premises in the first portion of the decree mentioned;" and, Second. "Because the respondents are mortgagees in possession of the said Royal Oak public house, and liable to account as such, and not, as in the decree mentioned, to the appellant as administratrix of the said John Farrell Parkinson, deceased, for the rents and profits of the same, and are, whether in possession as mortgagees, trustees, or agents, liable to account for the profits and proceeds of the business of the said public house."

I will take the second reason of the appeal first. It is very clear that in the peculiar case of a mortgagee who chooses to assert his rights by taking possession of the mortgaged estate, and who is not bound to render any account to the mortgagor if the mortgagor sues for a redemption of the property, the mortgagee who has so taken possession is bound to account, not only for the rents and profits which he has received, but also for everything which he might have received but for his own wilful default. That, I believe, is the only instance in which a person in possession of an estate who is called upon to account is made answerable for that which he might have received but for his wilful default. Therefore it was necessary, in order to lay the foundation for this appeal, to shew that the defendants were actually in possession, and in receipt of the rents and profits as mortgagees. Now it appears

to me that the appellant has entirely failed in establishing this case.

Under the memorandum of the 10th of May, 1828, the defendants were in receipt of the rents and profits, as the agents of Parkinson, and they continued in possession in that character down to the 7th of June, 1834. On the 9th of October, 1834, they came into possession under a different character, as vendees, upon the sale by the executors of Chambers. They received the rents down to the 7th of June, 1834; but, in addition to this, it appears by the accounts that they received the Midsummer rent for 1834, and the Michaelmas rent for 1834, being the rents for a period between their delivering up possession, which they held as the agents of Parkinson, and the time of their becoming vendees under the purchase from Chambers' executors, on the 9th of October, 1834. Now, that sale having been held to be invalid, it is contended on the part of the appellant that these rents, having been received without any right under the memorandum of agency, or any right under the purchase from Chambers, that therefore the only title which the defendants can pretend to for the receipt of these rents must be in their character of mortgagees. But, in the first place, these rents were received, not during the interval between June, 1834, and October, 1834, but the Midsummer rent was received on the 29th of November, 1834; that is after the purchase from Chambers' executors, and the Michaelmas rent was received on the 10th of February, 1835. How is it possible to say that, under these circumstances, the defendants ought to be charged in respect of the receipt of these rents as mortgagees, and that in that character the appellant is entitled to have a decree against them for an account?

It may be, my Lords, that they were not entitled to receive those rents at all: that is putting it in the most unfavourable way for the defendants. It may be that they were entitled, under the contract of sale with Chambers' executors, to those rents, although the purchase deed was not executed until after those rents became due. It may be that they considered that they were entitled to those rents under the purchase deed as back rents. But it is perfectly clear that they never assumed to receive those rents as mortgagees, and, therefore, if it is only where a mortgagee asserts his strong right by entering into possession and receiving the rents and profits, that, when he is called on to account, he has to account not only for what he has received, but also for that which he might have received but for his own wilful default; that principle cannot certainly apply to this case.

My Lords, it appears to me to be impossible to put the case in

the way in which it was ingeniously put by Mr. Darby, that the sale by Chambers' executors having been decreed to be invalid, there was no other title on which the defendants could possibly be in possession except that of being mortgagees, and that, therefore, retrospectively, it must be considered that their possession must be applied to that title as mortgagees, and to no other. I apprehend that it is perfectly clear that that cannot be maintained. . . .

LORD CRANWORTH. My Lords, I think, with my noble and learned friend, that the appellant has completely failed in establishing either of the propositions for which she contends. She says that the Vice-Chancellor first of all, and subsequently the Lords Justices, were wrong in dismissing the bill, so far as it generally sought a decree to account against the respondents as persons who have received money as agents for her, or for her late father, whom she represents; and, secondly, upon the ground that they ought to have been charged as mortgagees for wilful default, whereas they were not so charged. . . .

Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the Royal Oak public house ought to have been directed, charging the defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the respondents with being in receipt as mortgagees upon two grounds. That which was insisted upon mainly was this: that their title, which they acquired under Chambers on the 9th of October, 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of Chambers, and Chambers was merely a mortgagee.

I think that it is perfectly clear law that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases; but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule. Whether it would be correct to say that, under those circumstances, a person who entered into possession not as mortgagee may not afterwards become mortgagee in possession with all the liabilities of a mortgagee in possession, is a proposition which need not be laid down now. It is possible that, by distinct circumstances, it may be

shewn that there was an intention to alter the character from the one to the other. But nothing of the sort appears here, and it is perfectly clear that although these respondents were properly treated as parties who had not a valid title as purchasers, because there was nobody who could give a consent to the sale on behalf of the representatives of Parkinson, yet they treated themselves as purchasers having a valid title and supposed that they were in possession as purchasers, and were therefore liable to account only in the ordinary way for the rents.

Then a point was raised to shew that they were mortgagees upon this ground: It seems that they gave up possession as agents on the 7th of June, 1834, and they did not acquire their title as purchasers till the 9th of October, 1834. After they had acquired their possession as purchasers, or supposed purchasers, on the 9th of October, 1834, they received two portions of rent, namely, that which accrued at Mid-summer, 1834, and that which accrued at Michaelmas, 1834. Now, it is said that, as purchasers in October, 1834, they could not have been entitled to those rents, because they would only have been entitled to the rent which accrued after they became purchasers. How came they to receive those rents? It is said that, because they were mortgagees under the mortgage of January, 1828, it must be presumed that they received those rents under their title of mortgagees, and not under the purchase from the executors of Chambers.

It appears to me that that would be pushing the doctrine to a most extravagant length. Mortgagees in actual possession they certainly were not, for they only received rents (which is the same thing, however, in point of law), but they did not receive them during the time they were agents, or during the interval between their ceasing to be agents and becoming purchasers; but they received them afterwards, and I take it that they had then no right to receive them as mortgagees. It is certainly too much to force upon persons the character of mortgagees in possession, when they never were in actual possession as such, and never received any rents, except when they had by subsequent arrangement become entitled, as they believed, as purchasers, to the actual possession, or to the actual receipt of rents and profits thence accruing.

It seems to me, therefore, my Lords, that the case entirely fails. It is only very much to be deplored that this lady should have involved herself in this course of protracted and useless litigation. I agree, therefore, with my noble and learned friend in thinking that we ought to follow the Vice-Chancellor and the Lords Justices by dismissing the appeal, with costs.

LORD WESTBURY. My Lords, I have felt some anxiety in this

case, by reason of the form of the decree to account for the rents and profits, and certainly that is a point which deserves some attention on the part of the House. I take the law to be this. It is undoubtedly settled in the courts of equity that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account not only for what he has received, but for what, without wilful default, he might have received. It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a court of equity as the bailiff of the mortgagor. Now an account against a bailiff was, both at common law and in equity, given with wilful default. That is almost the only case, save in cases of fraud or breach of trust, where wilful default is infused into the form of the account. And if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default.

But if that ground is referred to as the foundation of the practice, it must of necessity follow that the party receiving receives in the character to which that relation of bailiff and principal may be properly imputed; and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents, as the bailiff of the mortgagor, or that that relation could properly be imputed to him. Supposing that to be the origin of the rule, it will, therefore, not be applicable to any case where the conclusion of the defendant being in receipt of rent as mortgagee is a conclusion consequential only on your having reduced and set aside some other pretended or alleged title, in respect or by virtue of which he had actually received the rents and profits.

The case here is clearly this: The present respondents claimed the Royal Oak, not in the character of mortgagees, but in the character of purchasers of the property from Thomas Chambers, by virtue of his power of sale. In that capacity they entered and enjoyed, and you have to remove that title by decree before you can fasten on them anything like that state of circumstances which would bring them within the character of mortgagees in possession.

But then it was said on the part of the appellant, with much ingenuity, that it appeared that they had actually received some rent which accrued due at a time anterior to the date of the contract of purchase, and that it was impossible to ascribe that receipt to any

other title than a title which they had as second mortgagees. But I do not think that that is a just or by any means a necessary consequence. The fact appears to be, that anterior to the contract of purchase they had been in the receipt of the rents of the Royal Oak, by virtue of an authority which they received from Chambers. Chambers, in fact, had claimed to receive the rents and to have the benefit of the property; and he had exercised that by means of an authority given to the respondents. Supposing that that authority had terminated in the month of June, 1834, anterior to the date of the purchase deed, yet it by no means follows that Chambers had then given up his right or claim to the receipt of the rents. It is impossible, therefore, to ascribe, with any accuracy in point of fact, the receipt of the two sums which actually came into the hands of the respondents in the months of November, 1834, and January, 1835, both of them after the date of the purchase deed, to the title which they might have asserted as second mortgagees, supposing Chambers had abandoned the receipt.

I collect, therefore, from the facts that the inference rather would be that these two sums of money, if they were not received by the respondents by virtue of their purchase contract, were received by them still on behalf of Chambers, and not on behalf of themselves, in the character of second mortgagees. There is no room, therefore, for the argument, ingenious as it was, and which might have had some effect, that anterior to their purchase they were *de facto* in receipt of the rents in the character of mortgagees, by virtue of their second mortgage.

Then we come to the question whether the case is affected by the decision in the case which has been very properly cited by the appellant herself this morning, namely, *Neesom v. Clarkson*, 2 Hare, 163. That is a case which is very material, and which needs some explanation, in order to shew that it has not a governing effect upon the case before your Lordships. The case arose under these peculiar circumstances. A man had contracted to purchase a fee simple. He died before he had paid the money. He made his widow his universal legatee and devisee. The equitable estate, therefore, which he acquired by virtue of that contract, passed, under his will, to his widow. His widow married again; and her second husband, supposing himself to be entitled, paid the purchase-money under that contract. He then mortgaged the estate, the estate being one to which he was entitled only *jure uxoris*, save in respect of the lien he had on it by having paid the purchase-money. He mortgaged it, and then conveyed it absolutely to a purchaser, in whose purchase deed, however, there were recitals

stating clearly and distinctly in what character the vendor, that is to say, the second husband, had acquired an interest in the estate. The widow died, and the second husband died; and on the death of the widow, there being no child of her marriage with her second husband, the estate, of course, descended to her heir-at-law. The heir-at-law filed a bill for the redemption of the property, and it was held by the Vice-Chancellor (unquestionably a strong decision) that the recitals in the purchase deed gave distinct notice to the purchaser from the second husband, that all his interest in the estate ceased upon the death of the wife, and that all that he could become entitled to was a claim in respect of the money which his vendor had paid on the original purchase. The purchaser from the second husband claimed to continue in possession. It was held that he had no title to the possession, save in respect of his lien for the purchase-money; and then, certainly by a very strong stretch of the authority of the Court, and of the principle, it was held, that as his purchase deed gave him a most distinct notice of the termination of the title of his vendor, and that he himself had no other claim than in respect of that sum of money which had been paid, his subsequent receipts must be referred to the only interest he had; and accordingly he was charged with an account directed with wilful default.

That approaches very nearly to the present case in favour of the appellant, but certainly stops somewhat short of it, and is distinguishable from it (though, if not distinguishable, I confess I should not have been disposed to recommend your Lordships entirely to follow that authority), because in the case then before the Vice-Chancellor there was nothing to set aside; and it was in the conveyance, upon the very face of it, was pregnant with information to the party that he had no title whatever, save in respect of his lien for the purchase-money. In the present case there was a question to be determined at the hearing. The question was this, whether the power of sale given to Chambers, which in its terms required notice to be given to the personal representatives of Parkinson, could nevertheless be operative, there being no such personal representative. It was held that it could not, and that the power did not arise, and that the conveyance therefore must be set aside. Although that was very right, yet I think it would have been very wrong if the old rule of the Court, founded on the principle of a mortgagee receiving rents, becoming in that respect the bailiff of the mortgagor, had been applied to a case where the parties clearly had taken the property, under a reasonable conclusion that the purchase deed, by virtue of which they had acquired possession, was a valid transaction, and gave them a *bona fide* title.

I am therefore, my Lords, of opinion in that respect with your Lordships, that the decree was rightly framed in the form in which we find it, and that the present appellant had no title to have the account directed with wilful default. . . .

Decree and order appealed from affirmed, and appeal dismissed with costs.

MORRIS v. BUDLONG, 18 N. Y. 543, 555 (Court of Appeals, 1879). This action was originally brought by Mary Morris for an accounting between her and defendant Budlong, and for repayment of moneys alleged to have been paid to him in excess of what he was entitled to; and to have two mortgages, one executed by plaintiff to one Ferguson, and the other by Ferguson to Budlong, canceled and discharged of record. The facts of the case were substantially as follows:

Plaintiff being greatly embarrassed and her farm about to be sold in foreclosure, defendant agreed to bid it in for the benefit of plaintiff, to purchase various outstanding claims against her and hold the farm "to secure him for such moneys as he should pay in carrying into effect this agreement, and give her one year which to redeem by repaying him the moneys he should pay out carrying into effect the agreement, and that Mrs. Morris should pay him all expenses, and for his time and trouble in connection therewith." Budlong thereafter purchased the claim referred to, took a deed of the Morris farm from the sheriff, on the 23d day of March, 1860, purchased the premises in question on the foreclosure sale, paying therefor in money and by his bond and mortgage \$11,290.87. To raise the money for these purposes, Budlong was obliged to go to Wisconsin to get in some investments which he had there, thus incurring expenses, and an absence from home of three or four weeks. That he should do so was agreed upon at the time the above arrangement was made. Immediately after the mortgage sale Budlong entered into possession of the farm, cultivated it, and received the profits thereof, except such portion as was received by the Morris family, until about March 31, 1866. During the first three years that family occupied the whole of the farm house, and during the remainder it was occupied by them and the family of Budlong. The time for payment by Mrs. Morris under the above agreement expired and was extended one year. The money was not paid, but no further extension was given. It was claimed in behalf of plaintiff, that defendant held the farm as mortgagee in possession and was chargeable not only with the rents and profits actually received by

him, but with the full rental value of the farm, which, it was alleged, had not been worked to its fullest capacity.

DANFORTH, J. An account rendered upon an application to redeem would properly charge the estate with the money advanced by Budlong and interest, with the expenses and compensation provided for by the agreement, and would credit the estate with whatever had been received from it by sales or rents and profits, as incident to the right of redemption, and as an equitable offset against the amount due on mortgage, after deducting taxes, repairs and other necessary expenses incurred on account of the estate. (*Ruckman v. Astor*, 9 Paige, 517.) It would include, therefore, the proceeds of timber sold and rents and profits actually received. That the farm was not worked to its fullest capacity furnishes no ground, under the circumstances of this case, for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the wilful default of Budlong in this respect could be found. Nor has it been. He is in no sense a wrongdoer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions, of which the one chosen is in direct contradiction of the written instruments which display his title, and he is therefore chargeable only with what he has received and not with what he might have received. "I think," says Lord Cranworth, in *Parkinson v. Hanbury*, 2 L. R. Eng. and Irish App. 1, "that it is perfectly clear law that where a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." In 1 Story Eq. Jur., s. 514 *a*. (10th ed.) it is said: "Where the estate is thrown upon one in the necessary enforcement of his legal rights, or comes to his possession as trustee, he should only be required to act in good faith and to account for what he in fact realizes;" and so in *Moore v. Cable*, 1 J. Chy. 384, Chancellor Kent directed the defendant to be charged only with rents and profits received. In *Harper's Appeal*, 14 P. F. Smith, 315, it is declared that "whatever the rule on accounting might be, where the party charged was a mortgagee under an ordinary formal mort-

gage, it ought not to be the same, when, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner." In the case before us there was not only a title taken by the defendant, by the plaintiff's wish, but there is alleged against it only an oral promise to convey at a certain time, upon payment of certain moneys, and no agreement to account in the meantime. There is nothing to show any want of good faith on the part of the defendant in his management of the property, nor that he did not act prudently and according to his best judgment in the matter. The omission of Mrs. Morris to redeem at the end of the time limited, the year, or at the end of the second year, her omission to arrange for further time to do so, the continued occupation of the premises by Mr. Budlong, apparently as owner, with no demand for an account of rents and profits—all bear upon this question, and, with the considerations before adverted to, show that the referee erred in measuring the profits for which Mr. Budlong was liable by the rental value of a farm worked to its full capacity rather than by what he actually received.¹

VAN VRONKER *v.* EASTMAN, 7 Met. (Mass.) 157, 163 (1843).
SHAW, C. J. The account must be reformed by making annual rests. 1. State the gross rents received by the defendant to the end of the first year. 2. State the sums paid by him for repairs, taxes, and a commission for collecting the rents,² and deduct the same from the gross rents, and the balance will show the net rents to the end of the year. 3. Compute the interest on the note for one year and add it to the principal, and the aggregate will show the amount due thereon at the end of the year. 4. If the net annual rent exceeds the year's interest on the note, deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. 5. At the end of the second year go through the same process, taking the amount due at the begin-

¹ *Barnard v. Jennison*, 27 Mich. 230 (1873); *Hall v. Westcott*, 17 R. L. 504 (1891), *accord*.

² Such commissions are allowed in Massachusetts: *Gibson v. Crehore*, 5 Pick. 146, 161 (1827); *Gerrish v. Black*, 104 Mass. 400 (1870); and in Connecticut: *Waterman v. Curtis*, 26 Conn. 241 (1857). But this is exceptional, commissions being generally refused even where stipulated for: *Bonithon v. Hackmore*, 1 Vern. 316 (1685); *French v. Bacon*, 2 Atk. 120 (1740); *Godfrey v. Watson*, 3 Atk. 517 (1747); *Clark v. Smith*, 81st (N. J.) 121, 137 (1830); *Harper v. Uva*, 70 Ill. 581 (1878); *Blair v. Syms*, 40 Hun. (N. Y.) 566 (1886). But see *Green v. Lamb*, 24 Hun. 87 (1881).

ning of the year as the new capital to compute the year's interest upon. So to the time of judgment.¹

MOSHIER v. NORTON, 100 Ill. 63, 73 (1881). **MR. JUSTICE SHELTON**. Complainant takes exception to the mode of stating the account in making annual rests. The Master reported that on January 1, 1870, the principal sum due from Norton to complainant was \$8782.50; that the accrued interest thereon to that time was \$8240.93; that the net rents up to that time were \$8617.47. As the amount of rents at that time exceeded all interest due, said amount of the rents to that time was deducted from the whole amount of principal and interest at that time, leaving a balance due complainant of his principal sum, \$8405.96, on January 1, 1870. Then to this sum was added the interest for one year, the taxes paid in 1870, and interest thereon to January 1, 1871, which made the sum of \$9490.48, from which was deducted the rent of 1870 as found, \$1711.50, leaving a balance due complainant of \$7778.98 at that date. Then follow similar annual statements of balances on the first day of January in each year, up to and including January 1, 1880, the rents as found for each year exceeding the interest and taxes for the year.

Complainant concedes the mode adopted by the Master in making annual rests was the proper one when no arrears of interest are due at the time the mortgagee enters into possession, but [claims] that, where the interest of the mortgagee is in arrears, as in the present case, when the mortgagee takes possession, the court will not require annual rests to be made, even although the rents and profits

¹"The two essential points are: First, that when there is a surplus of receipts in any year above the interest then due, a rest shall be made, and the balance remaining after discharging the interest shall be applied to reduce the principal, so that the mortgage shall not continue to draw interest for the face of it, when in fact the mortgagee has in his hands money that should be applied to reduce the principal, and thereby make the interest less for the following year. Secondly, although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due."—*Jones, Mortgages*, § 1139.

The cases are numerous and generally accord. *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13 (1814); *Reed v. Reed*, 10 Pick. (Mass.) 398 (1830); *Green v. Wescott*, 13 Wis. 606 (1861); *Gladding v. Warner*, 36 Vt. 54 (1863); *Mahone v. Williams*, 39 Ala. 202 (1863); *Adams v. Sayre*, 76 Ala. 509 (1884); *Bennett v. Cook*, 2 Hun (N. Y.) 526 (1874).

may exceed the annual interest, nor until the principal of the mortgage debt is entirely paid off. There is authority for this position and distinction. It appears to be supported by Judge Story in his Eq. Jur., vol. 2, sec. 1016, *a*, and the English cases cited by him. But there are American decisions which lay down a different rule, as we regard, and agreeing with the one which was adopted in this case. *Van Vronker v. Eastman*, 7 Mete. 157; *Green v. Westcott*, 13 Wis. 606; 2 Jones on Mort., secs. 1139, 1140.

No satisfactory reason appears to our minds why, when there is a surplus of receipts in any year above all the interest then due and disbursements, the balance remaining after discharging the interest should not be applied to reduce the principal; and this, irrespective of the fact whether there was or was not interest in arrear at the time the mortgagee took possession. We view the mode adopted by the Master in making annual rests just and reasonable, and find no error therein.¹

(c) *Superior Liens.*

GODFREY v. WATSON, 3 Atk. 517 (1747). LORD CHANCELLOR [HARDWICKE] said that a mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

HARPER v. ELY, 70 Ill. 581, 584 (1873). MR. JUSTICE CRABE.

It is claimed by appellants that the court erred in allowing

¹"Now, thinking, as I do, that, both upon principle and authority, the mere fact of an arrear of interest being or not being due to the mortgagee when the mortgagee takes possession, is not decisive upon the question of rests, but that every circumstance must be regarded, looking at all the accompanying circumstances, looking at the general right of a mortgagee not to be paid piecemeal, looking at the position to which Mrs. Priestly [the mortgagee in possession] has been driven by the wrongful acts of the parties opposed to her, I think that she ought not to be compelled to have her account taken with rests." *Per* Knight Bruce, V. C., in *Harlock v. Smith*, 1 Coll. Ch. 287, 297 (1844).

Compare *Finch v. Brown*, 3 Beav. 70 (1840); *Wilson v. Cluer*, *id.* 136 (1840); *Patch v. Wild*, 30 Beav. 99 (1861), and *Bennett v. Cook*, 2 Hun. (N. Y.) 526 (1874).

the Thompson and McQuestion debt. This debt was secured by a prior trust deed on the premises, and Ely, in order to protect his interest under the mortgage, under which he claimed, was compelled to discharge this lien.

We apprehend there can be no doubt but a mortgagee is entitled to be repaid all sums he may advance for the purpose of removing a prior incumbrance from the mortgaged property. The fact that Ely paid off or purchased this debt, which was a prior lien on the land, could work no hardship on the complainant. It was a subsisting debt, and a lien upon the mortgaged premises, and had to be paid, and whether complainants are required to pay it to Ely, or the original holder, can not, in anywise, prejudice their rights. But this debt was also secured by the Haddock mortgage, as well as a prior deed of trust, and may be regarded as a part and parcel of the mortgage debt from which complainants are seeking to redeem. In either event, however, we regard the decision of the Circuit Court on this point correct; but it is said ten per cent. interest ought not to be allowed Ely on this claim, after it came into his hands. The claim drew ten per cent. interest in the hands of the original holder, and when Ely bought or paid it, in equity he was subrogated to the rights of the original holder of the claim; and when the original creditor, by the terms of the contract, was entitled to ten per cent. interest, we fail to see upon what principle Ely would not be entitled to the same.¹

SIDENBERG v. ELY.

COURT OF APPEALS OF NEW YORK, 1882.

(90 N. Y. 257.)

Appeal from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made May 11, 1880, which affirmed a judgment in favor of plaintiff, entered on a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

¹*Silver Lake Bank v. North*, 4 Johns. Ch. 370 (1820); *Page v. Foster*, 7 N. H. 392 (1835); *Arnold v. Foot*, 7 B. Mon. (Ky.) 66 (1846); *McCormick v. Knox*, 105 U. S. 122 (1881), and the authorities generally accord.

MILLER, J. This action was brought for the foreclosure of a mortgage made by one William G. Ely, deceased, in 1825, to the Etna Insurance Company, to secure the sum of \$3000. It contained no clause in reference to taxes and assessments. In 1872, the Etna Insurance Company assigned the mortgage, together with the bond accompanying the same, to the Excelsior Life Insurance Company. This company paid, while it held the mortgage as assignee, certain taxes, assessments and water rates upon the mortgaged premises, and to redeem the same from tax sales, which together amounted to the sum of \$1640, or thereabouts. In the year 1875, the Excelsior Life Insurance Company assigned the bond and mortgage, with the whole amount due by reason of the payment for taxes, etc., to the plaintiff, who purchased at the request of the mortgagor, and under an agreement to extend the payment of the principal until September, 1878, previous to which time this action was commenced. Subsequent to his purchase, the plaintiff paid certain taxes and assessments, amounting to the sum of \$925. At the time of the assignment to the plaintiff, the sum of \$934.78 was due for interest. The defendant Catharine Ely is the widow and executrix of the mortgagor, who died leaving a will, by which he devised her the estate for life with remainder over in fee to the children of his brother James, who are defendants in this action. Upon the trial, the court allowed for the taxes, assessments and water rates paid by adding them to the mortgage, which, with the principal and interest found due to the plaintiff, amounted to the sum of \$7365.70.

The most material question upon this appeal arises in regard to the rights of the plaintiff to the amount of taxes and assessments paid by him and his assignor, and to collect the same out of the mortgaged property. The rule seems to be established by abundant authority that when the owner of mortgaged property refuses or neglects to pay taxes and assessments, or liens of a like nature, which are imposed upon the mortgaged premises, the mortgagee has the right to pay the same in order to protect his security, and the amount so paid may be added to and become a part of the mortgage debt, which may be enforced upon a foreclosure of the mortgage.

Willard, in his work on Equity Jurisprudence, at page 446, lays down the rule that taxes paid may be added to the mortgage debt, and he adds, "so money paid by the mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt in equity;" he further says at page 448, "with regard to the amount to be paid on redeeming, it may be said, that as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added

to the mortgage debt." The same rule is upheld in Thomas on Mortgages, at pages 86 and 276, and in Jones on Mortgages, at sections 77 and 1134. In the last authority it is laid down that this is so, although there be "no tax clause in the mortgage."

Numerous cases in the reports sustain this doctrine. (*Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Burr v. Veeder*, 3 Wend. 412; *Brevoort v. Randolph*, 7 How. Pr. 398; *Faure v. Winans*, Hopk. Ch. 283; *Marshall v. Davies*, 78 N. Y. 414; *Robinson v. Ryan*, 25 id. 320; *Williams v. Townsend*, 31 id. 414.) These cases are criticised by the counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle that a mortgagee, who to save his mortgage and protect his security is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage. Whether the doctrine of tacking, as claimed by the counsel for the appellants, has any application, is not important to consider, if the principle we have stated can be invoked to save the mortgagee from the sacrifice of the property by reason of unpaid taxes or assessments. In accordance with the authorities already cited, it is not necessary that the premises should be sold prior to the payment of the taxes or assessments before the mortgagee is authorized to pay the same, and add the amount paid by him to his mortgage. (See *Eagle Fire Ins. Co. v. Pell*, and *Williams v. Townsend*, *supra*.)

The doctrine that neither the plaintiff nor his assignor could have any benefit from the doctrine of subrogation, because they voluntarily paid the taxes and were conspirators, cannot be upheld. There is no finding in the case that either of them purchased the mortgage with the intent of paying the taxes and assessments so as to relieve the life estate and cast the burden upon the remaindermen; they were paid evidently in self-defense, and for the purpose of saving their liens as mortgagees. It cannot, therefore, be said that they were volunteers, or that they acted in bad faith as to others, or to any one who was under a legal necessity to make the payment, even if it may be urged that if the taxes had remained a lien, the life-tenant would have been obliged to pay them to prevent a sale of the property by the State or a return thereof, as that furnishes no reason why the plaintiff had not a perfect and complete right to protect his security from sale for the taxes. There is no rule by which the holders of the mortgage were obliged to delay the payment so as to compel the remaindermen to take action in regard to the same and relieve the property. They should have been vigilant in looking after their rights, and if they had done

their duty the taxes would not have accumulated. Having failed to perform a plain duty, if they desired to protect the property against the taxes, after they have permitted the mortgagee to pay the taxes, they are in no position to object that it operates as a hardship upon them. They would have had an undoubted right to make application for the appointment of a receiver to collect the rents and apply them to the payment of the taxes. (*Cairns v. Chabert*, 3 Edw. Ch. 313; 1 Washburn on Real Prop. 97.)

In the case we are considering, the taxes remained unpaid from the year 1865 to the year 1872, and then again from 1872 to 1874, all inclusive. For eight years they were allowed to accumulate in the first instance, and afterward for three years, and during that period no effort was made to pay them, nor any attempt to compel the owner of the life estate to pay them, or the appropriation of the rents for that purpose. Here was a gross neglect which would have resulted in the sale of the property, and perhaps the destruction of the estate, but for the intervention of the owner of the mortgage.

Again, if the mortgagee or his assignee had the right to pay within the authorities to which we have referred, to protect his mortgage lien, any equity which might have existed between the life-tenant and the remaindermen cannot destroy or take away that right. The remainderman's rights and his interests are subject to the right of the mortgagee, which was a prior and superior right given by the mortgagor. If the mortgagor had survived, and the mortgagee had paid the taxes, the amount paid would clearly have been a claim against the mortgagor and the mortgaged premises. The devisees of the mortgagor cannot have any greater or better right than the mortgagor, and they stand in his place. There was no evidence of any fraud or any conspiracy, to impose upon the remaindermen an obligation which belonged to the life-tenant to perform. The mortgage was purchased by the plaintiff in good faith, as found by the trial court, which also refused to find to the contrary. The effect of the payment was, although it increased the amount of the mortgage, to cancel and discharge the lien of the taxes for the same amount. The estate of the appellants was bound to pay the taxes, and the payment by the mortgagee, or his assignee, did not add or increase the burden imposed thereby, but in fact it operated to reduce the rate of interest on the amount of such taxes. Equity could not grant relief to the remaindermen, for the reason alone that the lien had been changed from a tax lien to that of a mortgage lien, and we are unable to see why the life-tenant could not as well have been charged with the burden of the taxes after payment by the mortgagee, as he could before such

payment, and in this case no reason existed why the interest of the life-tenant in the fund after payment of the mortgage by a sale should not have been burdened with this charge.

The defendants claim they are entitled to pay up the mortgage and to be subrogated as mortgagees, leaving the plaintiff to his remedy, or if the property be ordered to be sold, that the value be computed, and only that value, less the present value of taxes and interest during the life in expectancy, be applied to the accretions, and that after applying the present value of such taxes and interest only, the remainder of the principal sum be paid out of the sale of the inheritance.

It does not appear that the defendants have applied to be subrogated as mortgagees, or placed themselves in a position which entitled them to an assignment of the mortgage; nor was the question raised upon the trial as to the application of the interest and taxes. The plaintiff is entitled to the payment of the mortgage out of the real estate upon a sale thereof, and the question as to the disposition of the surplus, if any there be, does not arise upon this appeal.¹

The other points urged by the appellants' counsel have been carefully examined and considered, but none of them present any sufficient ground for a reversal of the judgment. There being no error, it should be affirmed.

All concur, except RAPALLO and TRACY, JJ., absent.

*Judgment affirmed.*²

¹A portion of the opinion, not relating to the question under examination, is omitted.

²There is no dissent from the doctrine of the principal case, the apparent aberration of the Supreme Court of Iowa in *Savage v. Scott*, 45 Iowa, 130 (1876), having been promptly corrected: *Barthell v. Syrverson*, 54 Iowa, 160, 164 (1880). The same result is reached in Kansas by statute. Gen. Stat. 1889, Ch. 107, § 148; *Stanclift v. Norton*, 11 Kans. 218 (1873). That a mortgagee who has redeemed from tax sale is to be allowed only the amount of the taxes and not the amount paid by him for redemption, see *Moshier v. Norton*, 100 Ill. 63, 74 (1881). As to the position of mortgagee purchasing at tax sale, see *Dale v. McEvers*, 2 Cowen (N. Y.) 118 (1823); *Strong v. Burdick*, 52 Iowa, 630 (1879).

(d) *Mortgagee, how far a Trustee.*

MANLOVE v. BALE

HIGH COURT OF CHANCERY, 1688.

(2 Vern. 84.)

One Bruton having a church-lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father, in consideration of 550*l*. The conveyance was absolute. But Mr. Bale, the purchaser, by writing under his hand and seal, agreed that if Mr. Bruton, the vendor, should at the end of one year then next ensuing pay him six hundred pounds, that he would reconvey; the six hundred pounds was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father; and now it was near twenty years after the first conveyance. Bruton being a prisoner in the Fleet, and indebted to the Warden for chamber-rent, assigns to him all his right, title, interest, equity and power of redemption; and thereupon the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But, notwithstanding, the MASTER OF THE ROLLS decreed a redemption on payment of the 550*l*. which was the first consideration money, as also the fines paid upon the renewal of the leases, which monies were to be paid with interest, and the account of profits was to commence but from the death of Peter Bale, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the 550*l*. consideration money.¹

"The mortgagee here doth but graft upon his stock and it shall be for the mortgagor's benefit."—*Per Nottingham, L. Ch., in Rushworth's Case*, 2 Freeman, 12 (1676).

"This additional term comes from the same old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagee's getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."—*Per Curiam in Rakestraw v. Brewer*, 2 P. Wms. 311 (1728). But see *Nesbitt v. Tredennick*, 1 Ball & B., 29, 46 (1808), and compare *Keech v. Sandford*, Sel. Cas. Ch. 61 (1726).

AMHURST v. DAWLING.

HIGH COURT OF CHANCERY, 1700.

(2 Vern. 401.)

The defendant having mortgaged the manor of Thundersley, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff.

Per Cur. Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest and costs, if the plaintiff will not accept his money, interest shall cease, and an injunction to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt, and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor.

And the like order was made between Jory and Cox,¹ where the defendant had an injunction against the plaintiff to stay his presenting to a church, that became vacant pending the suit.

CHOLMONDELEY v. CLINTON, 2 Jac. & W. 1, 177 (Court of Chancery, 1820). In a bill for redemption of certain mortgaged estates the plaintiffs showed that the defendant, Lord Clinton, unlawfully claiming the equity of redemption, was in possession of the estates, and prayed that he be decreed to deliver them up. Lord Clinton answered and showed that he had been in quiet and undisturbed possession and enjoyment of the premises for upwards of twenty years, paying the interest on the mortgage during the whole of that time.

It was argued on behalf of the plaintiffs that Clinton's possession, being avowedly that of a mortgagor, must be referred to the estate of the mortgagee, and that the latter, as trustee of the rightful mortgagor, the plaintiff, Mrs. Damer, could not set up or recognize a claim hostile to her interest.

SIR THOMAS PLUMER, M.R. These appear to have been the principal reasons assigned for this doctrine. I cannot bring myself to adopt them. The view which is taken by them of the relation subsisting between mortgagor and mortgagee, and the character, rights, and duties separately belonging to each, is not the view which is

¹Finch, Pre. Ch. 71. See also *Croft. v. Powell*, Com. Rep. 609.

taken and acted upon in a court of equity. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature, and is regulated not by the form of the conveyance, or the legal consequences and effect of it, but by a system of rules established by a long train of decisions, and universally adopted and acted upon in a court of equity. If the form of conveyance and the legal title were to prevail, the absolute ownership of the estate, after the condition is forfeited, would, in the case of a mortgage in fee, belong forever to the mortgagee, without any trust or defeasance of any kind. The mortgagor would then be reduced to the condition in which the argument represents him to be. But is that the light in which he is ever considered in equity? Is he there for any purpose ever considered as a tenant at will, holding the possession under the mortgagee? Is any point better established than that a mortgagor, after executing a mortgage in fee, and after the condition forfeited, is still considered to remain the absolute owner of the estate, as he was before, for every purpose as against all the rest of the world, and as against the mortgagee for every other purpose, except only the security and pledge which the estate is become for the repayment of the debt contracted by the mortgage? It would be a useless waste of time to cite authorities upon a subject so familiar. . . .

It is said that the mortgagee is a trustee for the mortgagor; that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually and of necessity an admission of the title of the other; that the length of time cannot be set up as a bar by the mortgagee against his *cestui que trust*, Mrs. Damer; and that the existence and validity of the title of the mortgagee being on all sides admitted, the benefit of it must be given by the mortgagee (the trustee) to his *cestui que trust*, Mrs. Damer. The equity of redemption is admitted to exist, and must, therefore, be given to the rightful, and not the tortious, owner.

I will consider separately each of these positions, and first, as to that of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built. That the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavoured to show. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a court of equity. Lord Mansfield, adverting to the comparisons made in

respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interests were, or to settle with any great precision in what respects the resemblance did, and in what it did not exist. But it would be productive of much error if it were to be concluded that the resemblance was complete, in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee? *Quo teneam vultus mutantem Protea nodo?* The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterise the relation: they are (as Mr. Justice Buller observes, in *Birch v. Wright*, 1 T. Rep. 383) characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied; its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the Rolls observes, that in general a trustee is not allowed to deprive his *cestui que trust* of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. By not interfering in this latter case, a court of equity does not, as it is supposed, in opposition to its usual principle, refuse to afford protection to a *cestui que trust*, against his trustee; but the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee

and *cestui que trust*. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest by the person claiming to be the mortgagor is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor.

The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee is the partial and limited right, which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either he is fully entitled to both, and to the legal and equitable remedies incident to both; but in equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him. When that is paid, his duty is to reconvey the estate to the person entitled to it; it never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself, nor is he allowed to use it for any other purpose. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy to the statute of limitations. When the interest of the mortgage money is tendered to him from year to year by the person who, claiming to have succeeded the original mortgagor in the

title to the equity of redemption, is, by the acquiescence of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate as the sole and admitted owner, can he be expected to refuse receiving it upon any doubts of his own respecting the title, when it is apparently abandoned by those who possess better means of judging of it, and who alone are interested in contesting it? If there is no fraud, or collusion of any kind, the fault lies wholly with those who possess the rightful title to the equity of redemption. The mortgagee is a mere indifferent stakeholder. The real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then, and not before, the implied trust, to surrender the estate to the person entitled to demand it, begins. If there is a question who that person is, it must be contested, not by the mortgagee, but by the parties concerned, and between them the title must be decided in the same manner, and by the same principles, though the form in which it may be contested may differ, as it would have been had no mortgage existed.

KIRKWOOD v. THOMPSON.

HIGH COURT OF CHANCERY, 1865.

(2 *De G., J. & S.* 613.)

This was an appeal from a decree of Vice-Chancellor Wood. The bill was filed by the heir-at-law and administratrix of Stephen Kirkwood, late of Kingston-upon-Hull, to redeem certain hereditaments which had been mortgaged and sold under the following circumstances: By an indenture dated the 17th January, 1846, certain hereditaments, the property of Stephen Kirkwood, were conveyed by him to William Cash and others in fee by way of mortgage for securing the sum of 5500*l.* and interest. The mortgage contained a power of sale in case of default in payment of principal or interest on six months' notice. By another indenture dated the 16th June, 1846, other premises were mortgaged by Stephen Kirkwood in fee to George Davidson and others, as the trustees of the National Provident Institution, to secure 4000*l.* and interest. By an indenture of even date the said sum of 4000*l.* was further secured by a second mortgage of the premises comprised in Cash's mortgage. The two last-mentioned deeds contained power of sale,

subject to the proviso that the power should not be exercised without six months' notice, or unless three months' interest was in arrear; and they also contained a proviso exempting the purchaser from liability to see to the performance of this condition, and restricting his remedy to damages only.

Subsequently to these deeds Stephen Kirkwood, having borrowed 1000*l.* from the North of England Fire and Life Insurance Company, agreed to execute a good and effectual mortgage to the defendants Messrs. Thompson and Carr, as trustees for the insurance company, of the hereditaments comprised in the previous mortgages. This agreement was carried into effect by an indenture dated the 10th December, 1847, and made between Stephen Kirkwood of the one part and Messrs. Thompson and Carr of the other part, whereby Kirkwood conveyed to Messrs. Thompson and Carr in fee all the hereditaments comprised in the above-mentioned mortgage-deeds, but subject to the prior mortgages, upon trust that Messrs. Thompson and Carr should, in their discretion, at any time, without any further consent or concurrence of Stephen Kirkwood, his heirs, executors, administrators, or assigns, sell and absolutely dispose of the premises, and should out of the proceeds of such sale pay all costs and expenses, and the principal money and interest due to themselves, and all other incumbrances, and pay over the surplus to the mortgagor. Kirkwood died in July, 1848, leaving a will, but the executor renounced probate, and administration was granted to Mary Todd, one of the plaintiffs, on the 10th February, 1859.

In 1849, in consequence of default having been made in payment of the interest due to them, the North of England Insurance Company entered into possession of the premises and received the rents, which were, however, as they stated in the answer, insufficient to pay the interest on the company's mortgage, after paying the interest on the prior mortgages. In 1850 the trustees of the National Provident Institution, with the consent of the persons interested in Cash's mortgage, put up to auction the whole of the hereditaments comprised in their mortgage. Previously to the sale the solicitors of the National Provident Institution communicated to the North of England Company their intention to sell, and gave them a formal notice to pay the prior mortgage, but no notice was given to any person on behalf of the mortgagor, there being at that time no representative of Kirkwood's estate. Mr. Hall, one of the directors of the North of England Company, attended the sale, which took place on the 24th October, 1850, and became the purchaser of part of the property for 5590*l.* The North of England Company adopted this purchase and paid the

purchase-money, and Hall executed a declaration of trust in their favour. The North of England Company was subsequently dissolved, and their business was purchased by the Liverpool and London Fire and Life Assurance Company, and the premises were conveyed to their trustees in May, 1860.

The plaintiffs filed the present bill against Messrs. Thompson, Carr and Hall and the Liverpool and London Assurance Company, praying that the plaintiffs might be declared entitled to redeem the premises purchased by Hall, and that Hall and all persons claiming under him might be declared trustees for the plaintiffs, and that, if necessary, the conveyance to Hall and to the Liverpool and London Assurance Company might be cancelled, and that the premises might be conveyed to the plaintiffs on payment by the plaintiffs of what should be found due from them on taking the accounts, and that in taking the accounts the defendants might be charged with the full value of the mortgaged premises at the present time, or at such other time as the Court might think fit. The Vice-Chancellor was of opinion that there was no reason either in law or under the special circumstances of the case for impeaching the sale, and dismissed the bill with costs. From this decision the plaintiffs appealed.

Mr. Willcock and Mr. T. A. Roberts, for the plaintiffs.—The sale to Hall was really one to the North of England Company, who were second mortgagees and also in possession. A second mortgagee cannot purchase for his own benefit from the first mortgagee. He is in the position of a trustee for the mortgagor; and here we have the additional circumstance that the purchasers were in possession, and had thereby an advantage in getting up the sale, and special means of knowledge. Moreover, they were not simple mortgagees, but trustees for sale, for their security was in that form, and they were, therefore, in a special position of trust. (*Rakestraw v. Brewer*, 2 P. Wms. 511; *Re Bloye*, 1 Mac. & G. 488; *Ex parte Rushforth*, 10 Ves. 409; *Smith v. Chichester*, 1 Con. & Law. 488; *Ex parte James*, 8 Ves. 337; *Downes v. Grazebrook*, 3 Mer. 200; *Ex parte Hughes*, 6 Ves. 617.) The case of *Shaw v. Bunny*, 13 W. R. 374, in which the Lords Justices differed, is the only authority against us. With respect to the question of value: the sale must be treated not as a sale between strangers, but as strictly as any other transaction between persons in a fiduciary relation.

Mr. Giffard and Mr. Kay, for the defendants.—The sale was by auction, and perfectly fair and open. Strangers were present, and purchased several of the lots. The second mortgagees had noth-

ing to do with getting up the sale, which was entirely managed by the first mortgagees.

The right of a second mortgagee to purchase from a first mortgagee is established by *Shaw v. Bunny*, 13 W. R. 374. And there is no distinction between an ordinary mortgage and a security in the form of a trust for sale. In neither case does the mortgagee stand in a fiduciary relation to the mortgagor. (*Parkinson v. Hanbury*, 1 Dr. & Sm. 143; s. c. on appeal, 13 W. R. 331; *Dobson v. Land*, 8 Hare, 216; *Knight v. Marjoribanks*, 2 Mac. & G. 10.)

Mr. Willcock, in reply.

THE LORD CHANCELLOR [LORD CRANWORTH]. This case does not appear to me to present any real difficulty. In the first place, that a mortgagee can purchase from his mortgagor is a matter that is always considered as settled, though, I believe, in some early cases there has been allusion to a doubt on the subject; and Sir Edward Sugden said that the relation between trustee and *cestui que trust*, although in some sense existing between mortgagee and mortgagor, has never been so held to exist as that the mortgagee cannot purchase from the mortgagor.¹ That is not disputed. Then if that is so, why should there be any difficulty on this subject? The real reason why a person standing in the relation of trustee cannot purchase from the *cestui que trust* is, that he cannot purchase that which he is to sell; he has a duty to perform and of course he cannot purchase, for that would be putting himself in a situation in which his interest would become an interest inconsistent with the duty which he has to perform.

The next step is, can he purchase under a power of sale executed by a first mortgagee? It seems to me to follow as a necessary corollary, because the sale that is made under the power of sale by a first mortgagee is substantially a sale by the mortgagor, for it is a sale made under an authority given by the mortgagor paramount to the title of the second mortgagee. It seems to me, that on the principle of the case there is no difference whatever between a purchase from a first mortgagee under a power of sale and a purchase from the mortgagor himself. Even if that were doubtful upon principle, I consider it to have been settled by authority in the case of *Shaw v. Bunny*, because there is no way of getting out of the fact that that case was so decided by the Master of the Rolls, was brought by way of appeal before this Court, and was so decided by the Lords Justices. It is very true that the learned Judge, Lord Justice Turner, expressed some doubt about it, but that does not signify; it is just the same as if the case were brought before a court where there are several Judges sitting, and the majority so

¹See 2 Sugden, V. & P. (8th Am. ed.) 689, and note (c).

decided; and it is by Act of Parliament determined that the affirmation of a decree of the Master of the Rolls, or one of the Vice-Chancellors, by the Court of Appeal, is just the same as if it had been so decided by the full Court. I think it is clear that that has been so settled. Lord Justice Knight Bruce, in affirming the decision of the Master of the Rolls in *Shaw v. Bunny*, decided in favour of the mortgagee's title, "there being no special circumstances" to prejudice his right: the only question is, whether there are any special circumstances here to vary the general rule.

Now the special circumstances relied on were these: First, the mortgagee was in possession. That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and the mortgagor which would not have existed if he had not been in possession. Nothing of the sort is suggested; no duty arises on being in possession, except, certainly, to account to the mortgagor in a way onerous to the mortgagee; but there is no duty which would prevent the relation between the mortgagee and his mortgagor different from what would have existed if he had not been in possession.

Then it was suggested that this was not strictly a mortgage at all; that it was merely a conveyance in trust to sell. It is true that it is in form a conveyance in trust to sell, but as between the mortgagor, the person conveying, and the person to whom it was conveyed in trust to sell, it certainly was a mortgage as far as he was concerned. He took possession, and he taking possession would be liable to account as mortgagee. It cannot be contradicted that between the parties conveying and the parties to whom it was conveyed it certainly was a mortgage. It is possible—I do not say whether that would be so—that there might have been different duties as between him and the mortgagor if he had sold than would have existed in the case of a simple mortgage. But what took place is something that comes in paramount and prior to the exercise of the duties as trustee; he never can sell, because persons having a paramount title to his title choose to exercise that right, and therefore prevent the possibility of his exercising his right, which is a trust only to arise if it was ever in his power to sell, which it was not, in consequence of the sale made by the prior mortgagees.

That being so, the next special circumstance that is alleged here is, that the parties stood in such a situation that we must take this as a sale at an undervalue. It was not urged, indeed it could not be urged, that here there was any undervalue as between third parties, so as to enable them to set aside the sale; but it was said the relation between these parties made that capable of being con-

sidered in a Court of Equity an undervalue which would not have been an undervalue as between strangers. That begs the whole question, because the moment you determine that this mortgagee or *quasi* mortgagee was entitled to purchase, you put him exactly in the position of a common stranger who purchases; so that there is no reason to look at the question of undervalue in a different way from that in which you would have looked at [it] if any third parties had purchased. It would be out of the question to talk of this as an undervalue; it was competed for at an auction. I agree with Mr. Willecock that being sold by auction would not be at all conclusive of the value, but there is no reason to treat this as a sale that was not made in the best manner possible; the vendors had the property valued, and precautions were taken that it should not be sold at an undervalue; it is perfectly true that shortly after the sale it would seem that the persons who had purchased had so far made a good bargain,—it was a very speculative sort of property,—that they had an opportunity of selling it at an advance of 1000*l.*, but that is quite immaterial, and I think, if that objection were to prevail, no sale could be safe, if after lying by for eleven years it was afterwards to be suggested in this way that the property was sold at an undervalue. I think, therefore, that the suggestion of undervalue fails entirely, and that that is not a matter that ought to influence my judgment. I think the decision of the Vice-Chancellor perfectly right, and consequently that this appeal ought to be dismissed with costs.

HOLDRIDGE v. GILLESPIE.

COURT OF CHANCERY OF NEW YORK, 1816.

(2 *Johns. Ch.* 30.)

The plaintiff, being possessed of a lease from B. W. and others, of a farm of about 309 acres (parts of lots 8, 9, and 10, in Crosby's manor), dated in November, 1806, for eleven years, subject to an annual rent of 75 dollars, on the 26th of May, 1808, assigned the lease to the defendant Thomas Gillespie. The assignment was absolute; but the assignee, at the same time, executed a defeasance, declaring that the assignment was made to secure a debt of 74 dollars and 12 cents, due from the plaintiff to Thomas Gillespie, with interest. Part of the land was cultivated and improved. In April, 1809, the defendant T. G. took possession of the improved part of the farm.

On the 29th of August, 1809, the plaintiff and defendants entered into an agreement, under seal, by which the plaintiff acknowledged that he had received of the defendants 100 dollars, as a compensation for one-half of his improvements on the lot, and he gave up one-half of the premises to the defendant T. G.; and to secure to T. G. 75 dollars, with interest, together with what might afterwards become due to the defendants, the plaintiff gave up the lease to T. G. until the 75 dollars and interest, and moneys to become due, should be paid, and T. G. engaged to give the plaintiff a good lease for half the farm for eight years from the 1st of February, 1808, subject to the rents, &c.

The plaintiff averred in his bill that the 100 dollars was to be paid by the defendants to the lessors for rent; that after the first agreement he delivered T. B. G. produce of the farm to the amount of 300 dollars, and performed work and services to the amount of 150 dollars; that T. G. went into possession of part, and the defendants had received the profits for 4 years, at the rate of 180 dollars a year; and that a balance was due to him from the defendants; that the defendant T. G., after the first assignment, applied to the lessors, and surrendered up the lease to them, and took a new lease in his own name and assigned it over to T. B. G. The bill prayed for an injunction against an ejectment brought by the defendants, in 1814, to recover possession of part of the premises occupied by the plaintiff, &c.

The defendants admitted that no money was paid to the plaintiff, but that the 100 dollars previously paid by them for rent to the landlords, and for 28 dollars and 34 cents paid for a debt of the plaintiff, were agreed to be the consideration of the agreement of the 29th of August, 1809. That the defendants had previously paid the landlords the 100 dollars, but no acquittance or receipt was given to the plaintiff for the amount. That the defendant T. G. had been in possession since 1809, and made improvements, which were specified; had paid the rent and taxes for the whole farm for the last three years, and that the plaintiff had paid only one-third of the rent for the year 1809. That the plaintiff had never paid the 75 dollars, or interest, and that he owed the defendant T. G. about 175 dollars, &c.; that the defendant occupied a small house and garden, and that the ejectment was brought for the house so occupied by the defendant T. G., but not for the cleared land.

THE CHANCELLOR [KENT]. The bill filed by the plaintiff is in the nature of a bill to redeem, and the plaintiff is entitled to redeem *the whole* of the premises contained in the lease, and to have the *entire* advantage of the new lease on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of

Manlove v. Bale, and of *Rakestraw v. Brewer* (2 Vern. 84, 2 P. Wms. 511), the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise to get a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 Dow. 269; 1 Ch. Cas. 191; 1 Bro. Ch. Cas. 198.) So, if a guardian takes a renewed lease for lives, the trust follows the actual interest of the infant, and goes to his heirs, or executor, as the case may be. (18 Vesey, 274.) Indeed, it is a general principle pervading the cases that if a mortgagee, executor, trustee, tenant for life, &c., who have a limited interest, gets an advantage by being in possession, "or behind the back" of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord Manners, in 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298.) The doctrine has been uniform from the decision of Lord Keeper Bridgman, above referred to, in 1 Ch. Cas. 191, down to the most recent decisions. Nor do I think that the agreement of August, 1809, ought to form an obstacle to the redemption of the whole. That agreement bears the mark of undue influence growing out of the first assignment; and contracts of that kind, made with the mortgagor, to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor. (1 Vern. 8; 2 Vern. 520; 2 Atk. 495; 2 Ball & Beatty, 278.) The general principle is, "once a mortgage always a mortgage;" and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear. In this case there was no satisfactory consideration for an abandonment by the plaintiff of one-half of his farm. The agreement was false on its face, for the consideration was not paid. A payment of the annual rent to the landlord was no compensation to the plaintiff for half of his farm; and if we can credit the subsequent declarations of the defendants, they regarded the *whole* farm as still subject to redemption. But without placing reliance on sayings of this kind, the paper itself, accompanied with the admission that the consideration was never paid to the plaintiff, is enough to justify me in not regarding that agreement as a valid obstacle to the original right of redemption.

I shall, therefore, direct a reference to a master to take and state an account between the parties, in which the plaintiff is to be

charged with the 74 dollars and 12 cents mentioned in the original defeasance, with interest from that time, and is, likewise, to be charged with all sums of money justly due to the defendants for goods sold, or advances by them, or either of them, made to and for his use, and on his account; and that the plaintiff is to be credited with all payments made, or articles of produce delivered, or work, labor, and services rendered to the defendants, or either of them; and that the defendants are to be charged with the net yearly value of the premises possessed by them, or either of them, during the time of their possession, after deducting the rent and taxes accruing and paid during that period; and that the pleadings and proofs taken in the cause be received as evidence before the Master, and that the question of costs and all other questions be reserved until the coming in of the report.

Decree accordingly.

HYNDMAN v. HYNDMAN.

SUPREME COURT OF VERMONT, 1845.

(19 Vt. 9.)

Appeal from the Court of Chancery. The facts, as they appeared from the bill and answer and the testimony taken, were substantially as follows:

In 1832 the orator, being indebted to the defendant and William Hyndman, executed to them an absolute deed of his farm in Barnet and received back a writing of defeasance. The orator received farther advances from time to time, until 1836, when the parties reckoned together the amount due and found it to be \$608.69, and then agreed that the defendant and William Hyndman should have the farm, free from the orator's equity of redemption, at eight hundred dollars; and the defendant accordingly surrendered to the orator the notes due from him and executed to the orator a note for \$191.31, and the orator surrendered his writing of defeasance; but it was at the same time verbally agreed between them that the defendant should sell the farm and the orator should have what was received therefor, above the sum of eight hundred dollars, after paying the defendant for his time and trouble in the business. The orator continued to reside on the premises until the commencement of this suit; and the defendant, subsequent to 1836, leased the premises from year to year to different persons and received the

rent, until March 30, 1840, when the parties executed an indenture, in which it was recited that the defendant and William Hyndman had paid to the orator \$869.80, as of the date of March 11, 1840, in consideration of which they held a warrantee deed of the premises in question; and it was agreed that the orator should have the use of the farm for one year for the rent of \$78.09, that if he paid the rent and the sum of \$869.80 before March 11, 1841, he should have a deed of the farm, but that if he did not make payment, the defendant should sell the farm at auction on the first day of April, 1841, and should pay to the orator what was received for the farm, above those sums, after paying defendant for his time and trouble. The defendant caused the farm to be sold at auction in 1841 and became the purchaser himself at \$1001.00, and offered to pay to the orator the surplus above the sums specified in the indenture; but the orator would not receive it. Testimony was given tending to prove that the orator was poor, and that the farm was worth \$1100, or \$1200. William Hyndman conveyed his interest in the premises to the defendant before the commencement of this suit.

The orator prayed that an account might be taken of the amount justly due to the defendant, and of the rents and profits of the premises received by the defendant, and that the orator might be permitted to redeem the premises.

The Court of Chancery, REDFIELD, Ch., dismissed the bill with costs from which decree the orator appealed.

The opinion of the court was delivered by

REDFIELD, J. This is an appeal from a decree made by the chancellor of this circuit. When the case was heard in the Court of Chancery, it appeared to me to be one of so much doubt that I did not feel justified in exposing the parties to the expense of taking an account of so long standing, until the necessity for such expense was fully established by the decision of this court. In that view I understand my brethren fully to concur. We by no means justify the practice, sometimes adopted in the Court of Chancery, of allowing appeals upon merely *formal* decrees, *without hearing*. Such a course is only calculated to increase the number of chancery appeals in this court and delay the final disposition of many of them, without any adequate saving. Every case should be *fully heard* in the Court of Chancery; and then, no doubt, the chancellor may, in his discretion, make a decree with a view of saving needless expense to the parties, in case the Supreme Court should be of opinion the orator cannot prevail.

But upon a full hearing of this case, upon very satisfactory arguments upon both sides, we incline to the opinion that the orator ought to be permitted to redeem. Cases of this kind will always

depend very much upon the determination of the facts. In that particular, one case is not a rule for the determination of any other case (unless the two cases are alike in all particulars, which never occurs), and therefore need not be reported, so far as the facts are concerned.

The points of law here decided are, that when the orator contracted to sell out his equity of redemption to his mortgagee, he is, in this court, entitled to very favorable consideration, on account of the unequal relations in which the parties stood at the time. The one was the superior and the other the dependent. The one had power and resources; the other had neither, but was sore pressed by necessity. In addition to this, the defendant was clearly the mortgagee of the premises for such a sum as it was not in the power of the orator readily to raise. The price was little more than two-thirds the value of the premises. It was agreed that the defendant should sell the premises, and if they brought more than the price paid by the defendant, the plaintiff should have the surplus. Under these circumstances we think the contract must, in equity, still be considered a mortgage, with a power of sale in the mortgagee. It is well settled that in all transactions between the mortgagor and mortgagee the conduct of the mortgagee will be watched very narrowly (4 Kent 143, and note, and cases there cited). This is the language of all the cases, and of all the books, in regard to all purchases made by trustees of the interest of the *cestui que trust*. Such contracts are not positively disregarded in a court of equity; but they are viewed suspiciously and criticised with some degree of severity.

The only other ground upon which the defendant claims to hold the estate free from the plaintiff's equity of redemption is, that in pursuance of the power of sale, he caused the estate to be sold at auction and became himself the purchaser. Such sales have always in the English chancery, and in this country, unless when the matter is controlled by statute, been held voidable, at the election of the mortgagor, or *cestui que trust*, unless he delay for an unreasonable time to make his election, in which case he will be held to have confirmed the sale by his acquiescence.¹ The cases are too numerous upon this point, and there is too little conflict in the decisions, to require an elaborate review of the subject.

The State of New York, by *statute*, allows the mortgagee, in such cases, to become the purchaser, if he conduct the matter with perfect fairness. In that State, therefore, the decisions upon this sub-

¹That an unreasonable delay is fatal to the right, see *Learned v. Foster*, 117 Mass. 365 (1875). For the effect of a transfer to a *bona fide* purchaser, see *Burns v. Thayer*, 115 Mass. 89 (1874).

ject rest upon a somewhat different basis from the English cases. In the former the sale is *prima facie* good, and it is, therefore, incumbent upon the *cestui que trust* to impeach its fairness; but in the latter the sale is always either good or bad, at the election of the *cestui que trust*.—as in the case of a contract of sale between an infant and an adult. The authorities will be found sufficiently referred to and digested in *Daroue v. Fanning*, 2 Johns. Ch. R. 252, and in Mr. Sumner's note to *Whichcote v. Lawrence*, 5 Ves. 740. *Bergen v. Bennett*, 1 Caine, 1, is somewhat of an elaborate case upon this point.

The decree of the Chancellor is, therefore, reversed and the cause remanded to the Court of Chancery to be there proceeded with.¹

WILLIAMS v. TOWNSEND.

COURT OF APPEALS OF NEW YORK, 1865.

(31 N. Y. 411.)

This was an action to enjoin the sale of mortgaged premises under a statutory foreclosure.

The plaintiff executed to the defendant's assignor his bond and a mortgage of premises situated in Buffalo, dated the 8th day of February, 1853, to secure the payment of \$2,640, in ten years from the date thereof with annual interest, which mortgage contained a further condition in these words: "and shall also pay all assessments, taxes and charges on the said premises to be charged on the same, and in case of default in paying the same, the said parties of the second part and their representatives may discharge such assessments, taxes and charges, and collect the same with interest from the time of such payment under this mortgage, in the manner particularly specified in the condition of a certain bond or obligation bearing even date herewith, &c." The condition of the bond, so far as it relates to the question in this case, was in these words: "and shall also pay all assessments, taxes and charges on the prem-

¹ *Stee v. Manhattan Co.*, 1 Paige (N. Y.) 48 (1828); *Benham v. Rowe*, 2 Cal. 387 (1852); *Mapps v. Sharpe*, 32 Ill. 13 (1863); *Garland v. Watson*, 74 Ala. 323 (1883), *accord*. Compare *Montague v. Davies*, 14 Allen (Mass.) 369 (1867), and *Farr v. Brown*, 40 Iowa, 209 (1875). See *The Howards v. Davis*, 6 Tex. 174 (1851); *Trim v. Marsh*, 54 N. Y. 599 (1874), *s. c.* page 299, *supra*, and New York Code Civ. Proc. § 2394, for the contrary doctrine.

ises described in the mortgage bearing even date herewith and collateral hereto, and in case of any default in paying the same, the said" (obligees) "may discharge said assessments, taxes and charges, and collect the same with interest from the time of payment as part of this bond, and the said mortgage." The mortgage contained a power of sale, providing that if default should be made in the payment of all or any part of the said principal sum of \$2,640, "or of the assessments, taxes and charges as aforesaid, or of the interest thereof, at the time or times when the same ought to be paid," then and in such case the mortgagees were empowered to sell the premises at public vendue, &c. "And out of the moneys arising from such sale or sales, to keep and retain in their hands the said sum of two thousand six hundred and forty dollars, together with such assessments, taxes and charges as shall have been paid by them, together with all costs, charges and expenses, on account of such sale or sales."

In 1856 the city of Buffalo assessed upon the said mortgaged premises taxes amounting to thirty-three dollars and sixty-six cents, for which the premises were sold at auction by the comptroller of said city on the 27th day of May, 1857, for taxes, interest and expenses, then amounting to \$36.75. The premises were bid off by one M. E. Viele for the term of five hundred years, and certificates pursuant to the provisions of the charter of said city were issued to him by said comptroller, in his name. Viele was, in fact, the agent of the defendant, who was then the assignee of the mortgage, and bid off the said premises for her, taking the certificates in his own name, as he testified, "for convenience of transfer."

On the 1st of August, 1857, the defendant, by her attorneys, commenced a foreclosure under the statute by advertisement in one of the Buffalo papers, which advertisement properly described said mortgage, &c., and claimed to be due thereon "\$2640 and interest thereon from February 8, 1857; and also the sum of \$36.75, with interest thereon from March 27, 1857." There was, in fact, no part of the principal of said mortgage or of interest thereon then due and unpaid. Before the day of sale mentioned in said advertisement the plaintiff paid to the comptroller of the city of Buffalo the amount legally necessary to redeem the premises from such tax sale; and defendant refusing to discontinue the proceedings of foreclosure, the plaintiff commenced this action to restrain her from selling said premises.

The court at Special Term held as a question of law "that the purchase by the defendant at the tax sale, and the taking and holding by her of the tax certificate, did not discharge the assessment, taxes or charges for which said premises had been sold at such

sale;" and that "the defendant was not entitled to enforce the repayment of the amount paid on such purchase as a part of the condition of said mortgage," and ordered judgment for the plaintiff.

The judgment was affirmed by the General Term of the 8th District.

DAVIS, J. By the condition of the bond and mortgage the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgage premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage. And the principal question in this case is, whether the purchase of the premises at the tax sales and the taking certificates of such purchase under the provisions of the charter of Buffalo, were a discharge of the assessments and taxes, within the true construction of the bond and mortgage.

By section 20 of title 5 of the charter of the city of Buffalo, as revised by the Laws of 1856, it is provided that the owner of any real estate sold for taxes may at any time before a declaration of sale is granted, as elsewhere provided by the charter, redeem the same by paying to the city treasurer, for the benefit of the holder of such certificate, the amount paid by him with the addition of fifteen per cent. per annum on such amount.

The certificates are transferable; and it cannot always be easily ascertained who the holder is. Hence the statute has provided that the redemption may be made by payment to the city treasurer. In all cases of sales for taxes the owner of the land is clothed by law with this right of redemption; and the tax, together with the expenses of the sale, remain a lien on the premises assessed, with an addition thereto of fifteen per cent., until the redemption or payment to the treasurer is made. The effect of the sale is therefore merely an assignment of the lien of the tax and the expenses then incurred, enhanced by the additional per centage; and this lien continues till the owner of the land makes the redemption, or the holder of the certificate takes title to the property in the prescribed form. It is therefore clear that the tax or assessment is not discharged by the sale and certificate. In this case the purchase at the tax sale was made by M. E. Viele, and the certificates of the comptroller were made to him, as he says, "for convenience of transfer." He was in fact the agent of defendant, but there was nothing in the manner of sale or form of the certificate to indicate that fact. The legal rights of the parties are perhaps the same as though the certificate had been made to the defendant; but it would certainly be very embarrassing to titles of real estate if the owner's right of redemption were dependent upon some undisclosed rela-

tion of agency between the apparent purchaser and the incumbrancer of the land. There would be no safety for him if he were not allowed to redeem; because the ostensible purchaser could transfer the certificate to a *bona fide* holder and subject him to great embarrassment and perhaps to the loss of his land. A mortgagee who desires to pay off taxes or assessments and charge them on the mortgaged premises has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment or redeem from a sale before the purchaser's title has actually ripened by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax sale and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law.

But it is insisted that the purchase and taking of the certificate by a mortgagee, who has the right by the terms of his mortgage, or under the general statute, to pay off taxes and add the amount so paid to the lien of his mortgage, is by operation of law, *ipso facto*, an extinguishment and discharge of the tax. To support this proposition the familiar principle that a person who is placed in a situation of trust or confidence in reference to the subject of the sale, or has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. (*Torrey v. The Bank of Orleans*, 7 Paige, 649; *Van Epps v. Van Epps*, 9 Paige, 257; *Burhans v. Van Zandt*, 3 Seld. 523.)

But this principle has never been carried so far as to prevent a junior mortgagee from purchasing the subject matter of the mortgage at a sale under a prior lien; nor has it been held that a title fairly purchased at such sale was held for the benefit of the mortgagor. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject matter, either under his own or any other valid lien. The defendant had no duty to perform to the plaintiff or toward the mortgaged premises that precluded her from buying at the tax sale. She was under no obligation to pay the taxes. The plaintiff had covenanted that she might do so at her option, and thereby acquire certain rights; but she had not undertaken to do it nor subjected herself to any burthen or obligation whatever in respect to the assessments or taxes. She might pay them or not, as she

chose, or she might stand upon her general rights and purchase at the tax sale, as others could do, for the purposes of investment or protection. But if this were not so, all that the principle sought to be invoked would require is that as purchaser she should take a redeemable interest only which never could ripen as against the mortgagor into a greater one, and not that the lien she purchased should be discharged or extinguished, leaving her to no remedy except the possibly inadequate one under the covenants of the bond and mortgage. It is my opinion, therefore, that the purchase at the tax sale did not operate to discharge the assessment and deprive the plaintiff of his right of redemption under the statute.

But it is urged that the failure of plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it; nor do I think it would countervail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due with the expenses of sale. (3 R. S., 5th ed., p. 860, § 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes; to give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that "*such assessments, taxes and charges as shall have been paid by them*" may be retained.

Besides, in my judgment, a mere naked breach of such a covenant in the condition of a mortgage, without the payment of any amount, would give no right to commence a foreclosure under the statute; but this it is not necessary to determine.

I think the judgment should be affirmed.

Judgment affirmed.

TEN EYCK v. CRAIG.

COURT OF APPEALS OF NEW YORK, 1875.

(62 N. Y. 406.)

Appeal from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff entered upon a decision of the court upon trial without a jury. (Reported below, 2 Hun., 452; 5 T. & C., 65.)

This action was brought to redeem certain real estate known as "Congress Hall," in the city of Rochester, from incumbrances held by the defendants as executors of the estate of John Craig, deceased, and for an accounting of the rents and profits.

The facts as found by the trial court are substantially as follows:

On the 23d of April, 1860, Nelson P. Stewart, then being the owner in fee of the premises, executed a mortgage thereon, and on a farm in Erie county, to the defendant John Craig, to indemnify him for becoming Stewart's surety in an undertaking made to stay proceedings on a judgment recovered in the Supreme Court on the 24th day of October, 1859, in favor of Maria L. Dehon, executrix, against Stewart, for \$10,184.83, on an appeal taken by Stewart from said judgment. At the time of the execution of said mortgage said Congress Hall property was subject to three prior mortgages, amounting to about \$19,000, two of which were then owned by the defendant Craig, and the third by Asa Sprague, who subsequently transferred it to Craig. The said property was also subject, at the time of the execution of said indemnity mortgage, to a lease executed by Stewart to Robert D. Cook, for the term of five years from the 1st day of May, 1860, at a rent of \$3600 a year, payable monthly in advance. On the 24th of April, 1860, Stewart assigned said lease and the rents payable thereon to Craig, as further indemnity for his becoming surety as above stated, by an instrument in writing.¹

Craig was made liable as surety, and was compelled to and did pay \$12,301.24 on said undertaking on the 7th of August, 1862. Craig foreclosed his indemnity mortgage, so far as it related to the property in Erie county, and realized therefrom the sum of \$2615.88. At the time when Craig signed said undertaking, and took said indemnity, said Congress Hall property was subject to a judgment theretofore recovered in the Supreme Court in favor of the Madison County Bank, or the trustees thereof, against Stewart, for the sum of \$2500 and costs, of the existence of which judgment Craig was ignorant at the time. On being informed of it he re-

¹ The assignment is omitted.

refused to justify as a surety to said undertaking, unless he was indemnified against said judgment, and therefore Stewart executed a bond, dated the 1st day of June, 1860, and procured the same to be executed by George K. Johnson and the defendant Elisha C. Litchfield, as his sureties, in the penal sum of \$5000, conditioned to protect said Congress Hall property against the judgment last above mentioned, which bond was delivered to Craig, and he then justified as surety to the undertaking given on appeal. On the 5th day of December, 1863, Craig recovered a judgment on said last mentioned bond against Litchfield for \$5179.69, which judgment Litchfield paid to Craig. On the 17th of December, 1860, the Congress Hall property was sold on an execution issued upon said judgment in favor of the Madison County Bank, and was bid off at such sale by the defendant Craig for the sum of five dollars. On the 17th of March, 1862, Daniel W. Powers, by virtue of a judgment recovered by him against Stewart on the 26th of January, 1860, for \$1481.78, redeemed the Congress Hall property from said sale, and on the 21st of March, 1862, the sheriff, in completion of such sale, executed a deed of said property to Powers. On the 7th of May, 1864, Powers, by deed of that date, conveyed said property to the defendant Craig, in consideration of the sum of \$1753.53 paid by Craig. The judgment under which Powers redeemed had been sold and assigned by him before the redemption, and on the 10th of April, 1860, to Oliver M. Benedict, of Rochester, in consideration of the amount then due on the judgment, paid by Benedict to Powers at the time. On the day of the redemption, to wit, the 17th of March, 1862, Benedict reassigned the judgment to Powers, without any valuable or valid consideration. At the time of each of those assignments, and for several years next preceding that time, Benedict was the attorney of Stewart, and was his confidential adviser. He purchased said judgment and took the assignment of it in his own name, at the request of Stewart. And the money which he paid for it to Powers was furnished by Stewart, or was replaced by him immediately after such payment, in pursuance of an arrangement between him and Benedict made before the money was paid by Benedict. There is no evidence that the assignment of the judgment from Benedict to Powers was authorized by Stewart, or that he knew of it. Craig, when he took the deed from Powers, had knowledge of the facts as to the relations between Benedict and Stewart, and as to the assignment of the judgments.

On the 27th of April, 1860, Stewart and his wife conveyed "Congress Hall" to Henry K. Sanger, by deed, subject to the several mortgages above stated, except the indemnity mortgage. Sanger died previous to July, 1864, leaving a will by which he gave to his

wife all his estate, real and personal, and named her as sole executor. She, as devisee and executrix, conveyed Congress Hall to the plaintiff Henry Ten Eyck, by deed dated 3d of January, 1867.

On these facts the court decided as matter of law, among other things, that the defendant Craig, on entering upon the collection of the rents on the assignment of the lease of the Congress Hall property, was in the position of a trustee for Stewart, in respect to the leased property, and his purchase of the same while he occupied that position inured to the benefit of the *cestui que trust*, at his election. That when Benedict held the judgment under which Powers redeemed, he held it in trust for Stewart. Powers, as the assignee of Benedict, without consideration, took Benedict's right in the judgment and no more. When Powers redeemed he took the land subject to the trust which attached previously to the judgment in his hands. That Craig was chargeable with notice of said trust. That Stewart, while he owned the Congress Hall property, had the right to redeem the same, on paying to Craig the amount of his liens and advances, over and above his receipts. That the plaintiff Ten Eyck, by means of the successive conveyances above stated, has succeeded to such right of Stewart to redeem said property, and is entitled to redeem.

ANDREWS, J. . . . It will be convenient in examining the questions which arise in the case to leave out of view for the present the facts relied upon as establishing a trust relation between Craig and Stewart, which disabled Craig from acquiring a title to the property hostile or adverse to Stewart or his grantee, and to consider the position of Sanger and his relation to the property after the sale and conveyance by the sheriff, upon the assumption that Craig as purchaser on the sale and the grantee of the redemption title was unaffected by any special disability, and acquired the same rights through the sale and the subsequent proceedings as if at the time of the purchase he had been a stranger to Stewart and Sanger, owing them no duty and bound by no obligation to protect the equity of redemption. It is not claimed that there was any fraud or irregularity in the sale on the bank judgment. The judgment was unpaid: the sale was open and fair, and so far as appears was not procured by the intervention of Craig. The sum bid, so far as appears, was at the time the full value of the interest of Sanger in the property. There is nothing which in any manner tends to impeach the *bona fides* of the sale. It is claimed, however, that the redemption was void, on the ground that the judgment under which it was made had been paid by Stewart, the judgment debtor, before the redemption, and was not at the time a lien upon the land.¹

¹ The discussion of this point is omitted. The learned judge reaches the conclusion that no right of redemption remains in Stewart or his grantees.

The next and principal question to be considered is, whether Craig, at the time of the sale, occupied such a relation to the property, or to Stewart or Sanger, that he was disabled from purchasing for his own benefit, and claiming the title adversely to them. If he occupied that relation, he cannot set up any right acquired as purchaser on the sheriff's sale in bar of their right to redeem. Purchases by trustees, or persons occupying fiduciary positions, in contravention of their trust or duty, are held in equity to be made for the benefit of the *cestui que trust*, at his election. No irredeemable title can be acquired upon such a purchase. And if the purchase by Craig was within the principle which prohibits a purchase by a trustee, it is an immaterial circumstance that the time within which a statutory redemption might have been made has expired. The right of redemption exists in favor of the *cestui que trust* and those in privity with him, independently of the statute, upon general principles of equity, and may be enforced at any time within the period allowed by the statute of limitations, or the rule of courts of equity regulating the jurisdiction.

The rule which prohibits a trustee from purchasing the property of a *cestui que trust* stands upon the proposition stated by the chancellor in *Whitchole v. Lawrence*, 3 Ves. 740, that one who undertakes to act for another in any matter shall not in the same matter act for himself. It applies in all cases where the duty which the trustee has to perform in respect to the property is inconsistent with his becoming a purchaser for his own use. And the purchase will not be allowed to stand, although the court may not be able to discover any wrong intention on the part of the trustee, or that he has gained any advantage in the transaction. The rule is inflexible, that he shall not place himself in a position where his interest is or may be in conflict with his duty. The reason of the rule, as remarked by Kent, J., in *Bergen v. Bennett*, 1 Cal. Cas. 19, is to bar the more effectually every avenue to fraud. Such a purchase, though it may not originate in any purpose to defraud, is a constructive fraud, because the natural tendency is mischievous and harmful. The rule is founded in the highest wisdom. It recognizes the infirmity of human nature, and interposes a barrier against the operation of selfishness and greed. It discourages fraud by taking away motive for its perpetration. It tends to insure fidelity on the part of the trustee, and operates as a protection to a large class of persons whose estates, by reason of infancy, infirmity, or other causes, are intrusted to the management of others. The rule is not limited in its application to those who are trustees strictly, holding the legal title to the thing purchased. (*Van Epps v. Van Epps*, 9 Paige, 237.) It applies to agents and persons standing

in relations of trust and confidence to others, which involve duties inconsistent with their dealing with the property as their own. The books are full of cases illustrating its application, and it will be sufficient to refer to a few of them. (*Fox v. Mackreth*; 2 Bro. C. C. 400; *Oliver v. Court*, 8 Price, 127; *Van Horne v. Fonda*, 5 J. Ch. 388; *Van Epps v. Van Epps*, *supra*; *Moore v. Moore*, 5 N. Y. 256; *Gardner v. Ogden*, 22 id. 327; *Michoud v. Girod*, 4 How. [U. S.] 506.)

It is claimed that Craig was disabled from purchasing the Congress Hall property at the sheriff's sale, and holding it adversely to Stewart and Sanger, under the rule just adverted to. There are two grounds upon which this claim is based: First, that Craig at the time was mortgagee in possession; and, second, that the relation of trustee and *cestui que trust*, in respect to the property, was created between Craig and Stewart by the instrument of April 24, 1860, which precluded him from purchasing for himself, or otherwise than as a trustee for Stewart, or his grantee. Assuming that the learned counsel for the plaintiff is correct in the position that Craig, at the time of the sheriff's sale, stood, in relation to the premises, in the character of mortgagee in possession, the question arises, whether a mortgagee in possession can buy the mortgagor's title on an execution sale, upon a judgment in favor of a third person against the mortgagor, and set up a title under the sale, as a defence to an action by the mortgagor to redeem. Another mode of stating the question is: Is a mortgage in possession a trustee for the mortgagor, so that he will not be allowed to buy in the equity of redemption on a sale upon an independent lien held by a third person?

Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. It is clear that no trust relation between the mortgagor and mortgagee is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title to the land, or the right of possession, before or after the mortgage debt becomes due. He owes the mortgagor no duty to protect the equity of redemption. The power of sale which usually accompanies a mortgage is given to enable him, by an adverse proceeding, to sell the equity of redemption for the payment of the mortgage debt. The objection that he could not become the purchaser at his own sale under the power has been removed by the statute when the foreclosure is by advertisement (2 R. S. 546, § 7); and a provision is inserted in every decree for the sale of mortgaged premises, unless otherwise specially or-

dered, that the plaintiff may become the purchaser. (Rule 73.) And he may buy in any outstanding title and hold it against the mortgagor (*Cameron v. Irwin*, 5 Hill, 280; *Williams v. Townsend*, 31 N. Y. 415; *Shaw v. Bunny*, 13 Week. R. 374; s. c., 2 De G., J. & S. 468.)

There is, in truth, no relation analogous to that of trustee and *cetui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title, because, under our law, he has no title whatever. (*Kortright v. Cady*, 21 N. Y. 342, and cases cited.) He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in incumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment, simply because he is mortgagee. (*Darcy v. Hall*, 1 Vern. 48; *Knight v. Marjoribanks*, 2 Mac N. & G. 10; *Chambers v. Waters*, 3 Sim. 42; 3 Sug. on V. and P. 227.)

Nor is the mortgagee converted into a trustee by taking possession as mortgagee of the mortgaged property, so as, in general, to prevent his purchasing an outstanding title, or under another lien. Under the English law he has the right to the possession, because he has the legal title to the land. Under our law he cannot obtain possession until foreclosure, except by the consent of the mortgagor, because until that time he has no title. A mortgagee is often called a trustee, and in a very limited sense this character may be attributed to him. There may be a duty resting upon a mortgagee in possession to discharge a particular claim against the land. If in such a case he omits to do it, and allows the land to be sold on such a claim, and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases on the sale, he would upon general principles be deemed to hold the title as trustee. So, if a mortgagee is allowed to take possession and undertakes to pay the interest on other liens out of the rents and profits and fails to do so, he could not purchase the land for his own benefit in hostility to the mortgagor on a foreclosure of an incumbrance for non-payment of interest which he was bound to pay. A mortgagee in possession is bound to account for the rents and profits; and in that respect, as was said by Shaw, C. J., in *King v. Insurance Co.*, 7 Cush. 7, he may be denominated a trustee. But, except in some special sense, that is not the relation he bears to the mortgagor. The relation of mortgagor and mortgagee is explained in the admirable judgment of Sir Thomas Plumer, in

the leading case of *Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 183. He says: "It is only in a secondary point of view and under certain circumstances, and for a particular purpose that the character of a trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it, and after that is fully satisfied its primary character is not fiduciary." And again: "The mortgagee when he takes possession is not acting as a trustee, but independently and adversely for his own benefit." A mortgagee in possession may purchase from a prior mortgagee and get an irredeemable title. (*Kirkwood v. Thompson*, 2 De G., J. & S., 613, and cases cited; *Parkinson v. Hanbury*, 2 D. & S. 143; s. c., 2 De G. & S. 450; see also, *Shaw v. Bunny*, *supra*; *Knight v. Marjot-banks*, *supra*.) Lord Cranworth, in *Kirkwood v. Thompson*, referring to the fact that the mortgagee at the time of the purchase was in possession, says: "That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and mortgagor, which would not have existed if he had not been in possession. Nothing of this sort is suggested; no duty arises on being in possession except to account in a way one owes to the mortgagee."

A mortgagee in possession is sometimes spoken of as a tenant, as having the legal rights of a tenant. (2 Wash. 150.) The analogy is not very close between the two relations; but it is difficult to see any reason for denying the right of a mortgagee to purchase and hold adversely to the mortgagor in a case when a tenant in possession would be allowed to purchase and hold against the landlord, and yet a tenant may purchase the demised premises on execution against the landlord, and when his title is perfected, set it up in bar of a recovery for rent thereafter accruing on the lease. (*Nellis v. Lathrop*, 22 Wend. 121.)

The first ground stated upon which it is claimed that a mortgagee disabled from purchasing on the sheriff's sale, viz., that he was a mortgagee in possession, cannot, I think, be supported; and it remains to consider whether such disability existed by reason of the agreement of April 24, 1860. The purpose of that agreement was to secure Craig for becoming surety for Stewart on the appeal from the Dehon judgment. This purpose was expressed in the instrument. The object was the protection of the mortgage, and if any trust in favor of Stewart resulted from the provisions of the instrument it was incidental and collateral to its primary intent.¹

I am unable to discover any duty arising out of the contract of April 24, 1860, or the circumstances resting upon Craig which de-

¹This part of the opinion is omitted.

barred him from purchasing, on his own account, on the execution sale. He was, in some sense, a trustee of the rents received under the arrangement, and was bound to dispose of them as required by the agreement, and this was the extent of his duty. He was not bound to protect Stewart against the loss of the rents through a sale of the land on the bank judgment. If a mortgagee in possession may purchase for himself on a foreclosure of another mortgage, or buy in an outstanding title, then *a fortiori* could a person in the position of Craig. The mortgagee under the English law has the entire legal title, and so far as he is regarded as trustee, the trust is the whole interest of the mortgagor. Craig at most was a trustee of the rents for a term only. He had by the agreement no interest as trustee or otherwise in the fee which he purchased on the execution sale.

The conclusion which I have reached is adverse to the existence here in Stewart or Sanger of a right to redeem, and it becomes unnecessary to consider whether, assuming such right to exist, the plaintiff, as grantee of Mrs. Sanger, succeeded to it. The rule which avoids purchases made in violation of his duty at the election of the *cestui que trust* is a valuable one and ought not to be impaired by engrafting upon it exceptions, or indulging in subtle refinements and distinctions to withdraw a particular case out of its true scope. But after careful consideration, I am unable to perceive that the facts of this case bring it within the rule, and am therefore inclined to affirm the order should be affirmed, and judgment absolute for defendants, pursuant to stipulation, with costs. Of this court, except Church, Ch. J., not voting. Folger, J., not of his court.

Porter,

*Order affirmed, and judgment accordingly.*¹

550.

the doctrine generally are accord. But see *Harrison v. Roberts*, 6 Fla. 711 to 713; *Thall's Exrs. v. Rives*, 34 Ala. 92 (1859), and *Roberts v. Flemming*, 52 Ill. 196 (1870), *semble*, limiting the doctrine of the principal case to a sale under a judgment of a third person having a lien paramount to that of the mortgage. Compare *Griffin v. Marine Co.*, 52 Ill. 130 (1869).

HALL v. WESTCOTT.

SUPREME COURT OF RHODE ISLAND, 1886.

(15 R. I. 373.)

Bill in equity to redeem a mortgage and for an account.

DURFEE, C. J. The bill states that on October 23, 1873, Walter J. Reynolds, being the owner of a lot in Providence, mortgaged it for \$800 to Stephen H. Williams; that subsequently the lot passed by mesne conveyances to Charles W. Adams, who, December 30, 1874, gave two mortgages thereon to Hiram C. Pierce, to wit, one for \$3250, and one for \$500, subject to the mortgage for \$3250; that the mortgage for \$3250, though taken solely in Pierce's name, belonged equally to him and the complainant Harriet Hall; that Pierce assigned the mortgage for \$3250 to the defendant Charles A. Westcott, who thereupon, January 23, 1875, gave the complainant Harriet Hall a writing in which he declared that he held said mortgage as to one-half in trust for her; that said Pierce subsequently assigned said mortgage for \$500, and his interest in said mortgage for \$3250 to said Harriet, and that said mortgage for \$500 contained a power of sale under which, in January, 1882, said Harriet duly sold the estate, buying it herself under notice as authorized by statute. The bill alleges that the defendant is in possession, and contains other allegations. It asks for an account and for leave to redeem. The defendant sets up several defences.¹

The third defence is that the mortgaged lot was sold for the non-payment of taxes, and bought by and conveyed to the defendant. This raises the question whether a mortgagee or his assignee, out of possession, can become a purchaser at a tax sale with the same effect, as against the mortgagor and other mortgagees, as if he were a stranger to the estate. There is some conflict of authority on this point. All the cases agree that there are persons who stand in such relations to the estate that they cannot purchase as if they were strangers. No person whose duty it is to pay the tax can be permitted to purchase at a sale for its non-payment, and acquire a good title as against others who are interested in the estate, since to permit him to do so would be to permit him to profit by his own default. Under this rule mortgagors, mortgagees in possession, life tenants, and tenants obligated by contract to pay the taxes, are incapacitated to become purchasers. The incapacity has likewise been held to extend to tenants in common, for, if the estate is sold for taxes to one of the tenants, it is sold for his default as well as

¹The consideration of the first and second defenses is omitted.

for the default of his co-tenants. (*Page v. Webster*, 8 Mich. 263; *Buller v. Porter*, 13 Mich. 292; *Cooley v. Waterman*, 16 Mich. 366; *Cooley on Taxation*, 346, 347.) So a person who occupies a fiduciary relation as regards the estate, cannot purchase it for himself. The trust in the one half of the mortgage for \$3250 is protected under this rule. And there are cases which enounce, or at least presuppose, a still broader doctrine, which may be stated thus, namely: that a purchaser who has an interest in the estate, such as would entitle him to redeem it if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. We find this doctrine nowhere more clearly asserted than in *Fair v. Brown*, 40 Iowa, 209. The defendant there was interested in the estate by judgment lien and as a second mortgagee. He bought certificates of sale for taxes, and subsequently took the tax deed. The court held that the prior mortgage was not defeated. "The land," says the court, "is a common fund for the payment of the plaintiff's," *i. e.* the prior mortgagee's, "mortgage and the defendant's liens. Defendant was authorized to redeem from the tax sale. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title." (*Garrettson v. Scofield*, 44 Iowa, 35; *Porter v. Lafferty*, 33 Iowa, 254; *Stears v. Hollenbeck*, 38 Iowa, 550.) In *Middletown Savings Bank v. Bacharach*, 46 Conn. 571, the defendant, having had an undivided eighth of an estate subject to a mortgage set out to him under an execution, purchased the estate at a sale for taxes assessed before he became interested in it, and the court held that he could not set up the tax title to defeat the mortgage, he being entitled to redeem the mortgage, which yet he could not do, if the mortgagee had paid the taxes, without reimbursing him. The court also said that the mortgagee was similarly incapacitated, because he could pay the tax and add the amount of it to the mortgage debt. In *Connecticut Mut. Life Ins. Co. v. Rulte*, 45 Mich. 113, the court lays down the doctrine that where a mortgagee, or one of two or more mortgagees, purchases the estate at a tax sale, the purchase may be treated as payment. "It is as just and as politic here," says the court, "as it is in the case of tenants in common, to hold that the purchase is

a payment of the tax." In the later case of *Maxfield v. Willey*, 46 Mich. 252, the court affirms the doctrine. "When the mortgagee," says the court, "instead of making payment of the taxes, makes a purchase of the land at tax sale, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest." The opinions in these cases were delivered by Judge Cooley, who, in the preparation of his book on Taxation, had occasion to make the subject a special study.

The most recent case which we have met with is *Woodbury v. Swan*, 59 N. H. 22, in which the Supreme Court of New Hampshire decided that the holder of a mortgage cannot defeat a prior mortgage by acquiring a tax title. The court rest their decision on the following reasons, as declared by Bingham, J., in delivering the opinion of the court: "Mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sale for the non-payment of taxes, and against outstanding tax titles; and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common, are in law jointly concerned. The common interest of these parties in the mortgaged property creates a relation of trust and confidence."

Other cases may be cited which support the same view, though not always for the same reasons. (*Moore v. Titman*, 44 Ill. 357; *Harkreader v. Clayton*, 56 Miss. 383; *Haskell v. Putnam*, 42 Me. 244; *Bassett v. Welch*, 22 Wisc. 175; *Whitney v. Gunderson*, 31 Wisc. 359, 379; *Chickering v. Failes*, 26 Ill. 507; *McLaughlin v. Green*, 48 Miss. 175.) In California it is held that a person who is under any obligation, either *moral* or *legal*, to pay the taxes, cannot become a purchaser. (*Moss v. Shear*, 25 Cal. 38; *Christy v. Fisher*, 58 Cal. 256.)

Other cases adopt a narrower view, and maintain that any person can become a purchaser who is not under any legal duty to pay the taxes. (*Williams v. Townsend*, 31 N. Y. 411; *Waterson v. Devoe*, 18 Kans. 223; *Bettison v. Budd*, 17 Ark. 546; *Ferguson v. Etter*, 21 Ark. 160.)

Our conclusion is that a mortgagee, either in possession or out of possession, is not entitled to purchase the estate at a tax sale, and set up the tax title as against the mortgagor or the other mortgagees. They all have a common interest in the preservation of the estate,

and therefore, if either of them purchases the estate at a tax sale, it should be presumed in favor of the others that he made the purchase for the common protection.¹

We think a case is shown which entitles the complainants to relief.

¹*Schenck v. Kelley*, 88 Ind. 444 (1882), *accord*. Compare *Medley v. Elliott*, 62 Ill. 532 (1872).

CHAPTER III.

EXTENSION OF MORTGAGE.

VANHOUTEN v. McCARTY.

COURT OF CHANCERY OF NEW JERSEY, 1842.

(4 N. J. Eq. 141.)

THE CHANCELLOR [PENNINGTON]¹. In 1836, during the rage for speculation in real estate, the complainant sold his farm, in the neighborhood of Paterson, to the defendant, John McCarty, for thirteen thousand dollars; the conveyance was made on the twenty-seventh of April, 1836, and, to secure so much of the consideration money, the defendant executed to the complainant a bond and mortgage, in the same day, for ten thousand eight hundred and twenty-two dollars and fifty cents, on the premises, payable in the following manner: one thousand dollars on the twenty-ninth of September, then next; two thousand dollars on the first of May, 1837, and the residue on the first of May, 1838, with interest from the first of May next after the date of the bond, payable on the first days of November and May in each year.

On the same day that McCarty got his deed, he conveyed the property to Kirk, Johnston and Copland, and they, under an agreement made by McCarty with Edward N. Rogers and John A. Stimler for a large advance, conveyed the property to them, by deed dated the twenty-fourth of September, 1836. Since the last deed, Edward N. Rogers and John A. Stimler have conveyed to Archibald G. Rogers, who has also conveyed to Nehemiah Rogers, in whom the equity of redemption now resides.

The bill is filed for the foreclosure and sale of these premises, under the mortgage made by McCarty to the complainant.

A decree *pro confesso* was taken against McCarty and wife, Edward N. Rogers and Stimler. Archibald Rogers and Nehemiah Rogers have filed separate answers, upon which the cause has been put at issue, and depositions taken.

The first ground of defence set up is that the transaction is usurious, and the bond and mortgage therefore void.²

¹ The opinion only is given.

² The discussion of this point is omitted. The learned Chancellor reaches the conclusion that the evidence fails to establish a case of usury.

The next point taken arises from the object the purchasers had in buying this property. They intended to set it off in building lots, and Edward N. Rogers, who had agreed in his purchase with McCarty for five years for the payment of the money, after getting his deed, learned for the first time, from the complainant, that the bond and mortgage were payable at an earlier day; he expressed his surprise, and told the complainant that he should look to McCarty and those concerned with him to make good their agreement; when the complainant told the witness that he did not believe there would be any difficulty, as his great object was to get his interest; that the witness thereupon told complainant he would think over the subject and make him a proposition. The witness then says, that the same afternoon he called on the complainant, and told him he would make this agreement with him—that if he would extend the time of payment of the bond five years from the twenty-seventh of April ensuing its date, making six years in all, and release the lots that deponent and Stimler should sell from the lien of the mortgage (provided such release did not exceed one-fourth of the property) on his being paid for the property thus released, or having the bonds and mortgages given for their purchase money assigned to him, that complainant might retain the possession of the residue of the farm free of rent, and that no claim would be made for rent for the time he had already occupied it. This proposition, he says, was agreed to by the complainant.

The evidence then proceeds to show that the complainant is guilty of a breach of this agreement; and it is insisted by the answer that the defendant, Nehemiah Rogers, is entitled, before the complainant can have his decree in this cause, to a specific performance of the complainant's agreement to release lots as they should be sold on the premises, or to have his damages for such breach of his agreement set off against the amount of the bond and mortgage.

This is taking a wide range, and involving in a case of foreclosure of a mortgage a great variety of matters and endless litigation. If this defence should be sustained, I see no limit on a bill of foreclosure to settling before decree every agreement and controversy respecting the land between the complainant and all the intermediate owners down to and including the present, and that, too, whether the mortgage has any connection with them or not. This agreement is not made with the mortgagor, but with Edward N. Rogers, an intermediate owner, and is declared to have been entered into long after the mortgage was made, and for purposes connected with the property growing out of the manner in which sales were proposed to be made. The defendant must, in my opin-

ion. be left on this agreement to his remedy at law. The complainant is able to refund in damages, as it is stated, for any amount in which he may be justly chargeable, and there is no safe mode in this court of settling questions of this character; it is properly a case for a jury to assess the damages, and not for investigation before this court. The evidence would lead me to believe that the complainant has not regarded, as he should have done, the position of men who had purchased property at so expensive a rate, and who had no way of remunerating themselves but by selling off lots; still, I do not see how the defendant can avail himself of such a defence in this action. Can this court decree a specific performance against the complainant of his agreement in this action? There is no precedent for such a course of practice, and to attempt to settle the damages incident to a breach of such an agreement would be equally against the course of procedure. I am, therefore, of opinion, that this defence cannot avail the defendant in this action.

The last objection is, that the time of payment for the principal was extended by the complainant for five years from the twenty-seventh of April, 1837, and the bond and mortgage will of course not be due until the twenty-seventh of April, 1842. This is clearly established, from the evidence, and the defendant is entitled to this time before payment can be demanded. Edward N. Rogers expressly so swears, and the whole evidence, as well as the statement in the complainant's bill, go to show such an understanding. It is well settled, that the time for payment may be extended by parol. (*Chitty on Contracts*, 27, in note; 1 *John. Cases*, 23; 3 *John.* 528; 2 *Wendell*, 587; 14 *John.* 330; 1 *Green*, 165; *Saxton*, 280.)¹

There must, therefore, be a reference to a master, to ascertain and report the amount due the complainant for interest on the bond and mortgage, after deducting a fair compensation for the use and occupation of the farm; and also, whether a part of the premises can be sold without material injury to the rest. The justice of this case, as far as I am able to reach it in this suit, as it appears to me, is to consider the time of payment for the principal of the bond enlarged to the twenty-seventh of April next, leaving the interest payable half yearly. The contract made for complainant's enjoying the possession free of rent, is part of the one for releasing a portion of the lands, subsequently made with Mr. Rogers, and must be settled with that.

¹*Tompkins v. Tompkins*, 21 N. J. Eq. 338 (1871),

VAN SYCKEL v. O'HEARN.

COURT OF CHANCERY OF NEW JERSEY, 1892.

(50 *N. J. Eq.* 173)

On final hearing on pleadings and proofs.

BIRD, V. C. The complainants in this case filed their bill to foreclose a mortgage which was held by the testator, in his lifetime, on lands in the bill described. The bond which the mortgage was given to secure had been due for many years. The bill was filed on the 25th day of November, 1891. In the month of March, 1891, the then owner of the premises entered into negotiations with Patrick O'Hearn, one of the defendants, for the sale to him of the said premises. O'Hearn was willing to purchase the premises, provided the testator, who was then living, would not require the payment of the mortgage, which he then held, for one year from the 1st of April then next ensuing. Both parties to the said negotiations requested Mr. Wyckoff, a counselor at law and intimately acquainted with the testator, to procure the consent of the testator that the time for payment of his mortgage should be extended for one year from the 1st of April, 1891. He did procure such consent. Thereupon the negotiations for the sale and purchase of the premises were carried through.

There being no doubt as to the amount of money actually due upon the bond which the mortgage was given to secure, the only question is whether the complainants had a right to commence their suit to foreclose said mortgage before the expiration of the one year from the first day of April, 1891. The complainants say that the obligation being in writing and under seal, the time for the performance thereof cannot be enlarged by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol. (*Bigelow v. Rommelt*, 9 C. E. Gr. 115; *Tompkins v. Tompkins*, 6 C. E. Gr. 338; *Margott v. Renton*, 6 C. E. Gr. 381; *Car v. Bennett*, 1 Gr. 165; *Vanhouten v. McCarty*, 3 Gr. Ch. 141; *Stryker v. Vanderbilt*, 1 Dutch. 482; *Bell v. Romaine*, 3 Stew. Eq. 28; *Sharp v. Wyckoff*, 12 Stew. Eq. 376; *Measurall v. Pearce*, 4 Atl. Rep. 678; *King v. Morford*, Sax. 274; *Stoutenburgh v. Tomkins*, 1 Stock. 332; *Baldwin v. Satter*, 8 Paige, 473; *Lattimore v. Harsen*, 11 Johns. 329.)

Again, the complainants say that if the time for performance of a written contract may be extended or enlarged by parol, some consideration must be shown therefor before the court will enforce such parol contract. The proposition thus stated is supported by

the authorities. (*Parker v. Jameson*, 5 Stew. Eq. 222; *French v. Griffin*, 3 C. E. Gr. 279, 281.)

But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract and makes promises to the defendant upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand. (*Martin v. Richter*, 2 Stock. 510; *Church v. Florence Iron Works*, 16 Vr. 133; *Phillipsburg Bank v. Fulmer*, 2 Vr. 55; *King v. Morford*, *supra*; *Huffman v. Hummer*, 3 C. E. Gr. 83, 90; *Stryker v. Vanderbilt*, *supra*; *Miller v. Chetwood*, 1 Gr. Ch. 208; *Cox v. Bennett*, 1 Gr. 165; *Lee v. Kirkpatrick*, 1 McCart. 264, 267; *Continental National Bank v. National Bank Com.*, 50 N. Y. 575; *Garrison v. Garrison*, 5 Dutch. 153.)

The bill should be dismissed with costs.

DODGE v. CRANDALL.

COURT OF APPEALS OF NEW YORK, 1864.

(30 N. Y. 294.)

Appeal from a judgment of the Supreme Court.¹

WRIGHT, J. The mortgage sought to be foreclosed by action was, in the winter of 1858-9, held by the administrator of S. V. R. Mallory, deceased. The premises covered by it had, after its execution, and about the 23d February, 1856, been conveyed by the mortgagor to the defendant Holcomb, who assumed the payment of the mortgage as a part of the purchase price of the premises. The mortgagor had paid the interest, and \$266.66 of the principal sum secured by it, before the sale and transfer of the premises to Holcomb. Afterwards Holcomb paid the interest. The whole principal became due and payable on the 1st March, 1858. Shortly

¹ The statement of facts is omitted.

before the 28th February, 1859 (the administrator of Mallory being about to foreclose the mortgage), Holcomb entered into an agreement with the plaintiff's testator, whereby the latter agreed to purchase the mortgage of Mallory's administrator, who then held the same, and extend the time of payment five years, or give that additional time from the time he took the assignment, to pay the balance due upon the bond and mortgage; in consideration of which, Holcomb agreed to pay him fifty dollars, which he did pay, and Holberton took the assignment of the mortgage, and continued to hold the same, and receive payments of interest thereon up to his death. The bond and mortgage were assigned to the plaintiff's testator on 28th February, 1859, and the time agreed to be given to Holcomb to make payment would not expire until the 28th February, 1864.

This foreclosure suit was brought in June, 1862, and the question is whether the executor of Holberton is entitled to sustain it, notwithstanding the contract of his testator to purchase the mortgage, and forbear foreclosing it for five years; or, in other words, to extend the time of payment of the debt secured to be paid by it, and which was due, for five years from such purchase. If Holberton, in the face of his contract, was not entitled to maintain an action to collect the principal secured by the mortgage by a foreclosure thereof before the five years elapsed, it is very clear his representative is not.

The ground taken at the trial was that the contract was void by the statute of frauds, not being in writing, and being an agreement that by its terms was not to be performed within one year from the making thereof. (2 R. S. 135, § 2, sub. 1.) I am of the opinion that it was not affected by the statute. The statute applies to executory, and not to executed contracts; and the one in question, I think, was of the latter description. It was certainly executed by Holcomb; and it seems to me the purchase of the mortgage by the plaintiff's testator was an execution on his part. Holberton agreed in substance to purchase the mortgage, and forbear to foreclose it for five years, in consideration of fifty dollars. He did purchase, and take an assignment of it, and Holcomb paid him the fifty dollars. Thus, the contract was fully executed. Nothing further remained to be done by either party. Holberton had simply to wait five years for his money. Holcomb had paid the consideration money, and Holberton had entered upon the contract by receiving the money and purchasing the mortgage, and neither party could rescind it. Neither could Holcomb recover back the money, nor Holberton refuse to carry out the contract, based as it was upon a good consideration, and which he had undertaken to execute.

The further point is now urged (although not alluded to on the trial), that the mortgage being a specialty, no agreement in regard to it could be valid unless the agreement was also a specialty. It may be conceded that ordinarily a sealed executory contract can not be rescinded or modified by a parol executory contract; but that was not this case. Here the mortgage was due. The holder was about to enforce it by action; whereupon Holberton agrees, for a valuable consideration, to purchase and refrain from collecting it for five years. This agreement is executed by the purchase; and as respected the plaintiff's testator, operated as effectually to extend the time of payment as if it had been under seal. Indeed, as title to the mortgage would pass by mere delivery without a written assignment, I cannot see why an agreement to extend the time of payment, if founded upon a good consideration, would not be valid and effectual for that purpose, even if executory, and not reduced to writing. The agreement, in this case, was not one varying the terms of the sealed contract so as to require it to be under seal, but rather an agreement, based upon a good and valid consideration, to hold such contract in abeyance until the expiration of the time fixed upon by the new contract. It was conceded upon the trial that Holcomb was in a proper position to set up the new contract, provided such an one was made.

But, in any event, as suggested by the learned judge delivering the opinion in the Supreme Court, the judgment is sustainable upon the equitable ground that the defendant, having a cause of action, would be allowed to set it up to prevent circuity of action. Holberton having taken the assignment, and held it under the contract as proved, and received a consideration therefor from the defendant, and this action being by his representative, it is the same as if he were seeking to foreclose the mortgage by suit, notwithstanding his agreement. If the defendant could have no defense to the foreclosure, still his agreement with Holberton would give him a right of action for the injury he received; otherwise he would be remediless. In the face of his agreement, Holberton, or his representative, ought not to be allowed to foreclose the mortgage, and on the principle of avoiding circuity of action, the law will give effect to such agreement as a defense to the foreclosure suit.

The judgment of the Supreme Court should be affirmed.

JOHNSON, J. The agreement between the defendant Holcomb and the plaintiff's testator was that the former should pay to the latter fifty dollars, and that the latter in consideration thereof should purchase the bond and mortgage in question, and extend the

day of payment of the principal for the period of five years from the time of the making of said agreement. Holcomb thereupon paid the money, and the testator purchased and took an assignment of the bond and mortgage. The mortgage debt was then wholly due, and the testator's assignor was about proceeding to foreclose the mortgage. The principal if not the only question in the case is whether this, being by parol, was a valid agreement, and operated to extend the time of payment of the indebtedness. If it was, and such was its effect, the action was prematurely brought, and the decision of the Supreme Court was right, whether the proper reason for the judgment was assigned or not.

That the time of the payment of a simple contract debt may be thus extended, so that no action will lie for its recovery until the expiration of the extended time, when the agreement to extend is founded on a good consideration, is too well settled to admit of question. Under the former system of practice, such an agreement, to defeat the action, could be proved under the general issue, as it went to show that nothing was due, and there was no cause of action when the suit was commenced. (1 Chit. Pl. 512.) And so, I suppose, under the present system the same evidence may be given under a general denial, as it goes to controvert what the plaintiff is bound to establish by his evidence, to wit: the existence of a demand due at the commencement of the action. In such a case the subsequent agreement operates upon the instrument, where the demand is evidenced by writing, and becomes part of it, so that the obligation, instead of becoming due according to its terms, is only due at the expiration of the extended time, and until that happens, no action can be maintained upon the instrument. The subsequent agreement does not operate to destroy the original agreement, but only to modify it in respect to the time of payment.

It is claimed, however, on the part of the plaintiff, that this principle has no application to instruments under seal, and that in regard to instruments of that character, it requires an agreement in writing of equal solemnity to effect a change or modification in any material particular. This seems to be the rule in such cases, before any breach of the specialty, and where the subsequent agreement is executory merely. It was so held in *Allen v. Jaquish*, 21 Wend. 628, and in *Eddy v. Graves*, 23 id. 84, cited in the opinion of the court in this case at general term.

But it is, I think, equally well settled that after the breach of a sealed agreement it may be modified in any respect, or wholly rescinded, by an executed parol agreement founded upon a sufficient consideration. (*Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Fleming v. Gilbert*, 3 Johns. 528; *Keating v.*

Price, 1 Johns. Cas. 22; *Delacroix v. Bulkley*, 13 Wend. 71; *Townsend v. Empire Stone-dressing Co.*, 6 Duer, 208.) Many other cases might be cited to the same effect, but the rule seems to be too well settled to require it.

That this was an executed and not a mere executory contract between the parties is extremely clear. The defendant's proposition was to pay \$50, in consideration that the plaintiff's testator would buy the bond and mortgage and extend the time of payment. This proposition was accepted by the testator who received the money and made the purchase. Nothing else was to be done. The agreement did not contemplate the doing of any further or other act to effect the extension. The extension was effected completely and perfectly in law the moment the agreement was consummated by the payment of the consideration on one side and the purchase of the securities on the other. The agreement was then completely executed, and took effect upon the bond and mortgage which, in the hands of the assignee, became due and payable as against the defendant Holcomb in five years, and not before. After that it was in no conceivable sense an executory agreement. Its entire object and purpose had been completely and perfectly fulfilled. It is upon this principle only that the proof of an agreement to extend the time defeats the action brought before the expiration of the extended time. The defense in such case does not proceed upon the ground of recoupment of damages for a breach of the agreement to extend, but upon the ground that the agreement, by its own force, operates upon the original contract, and effects the extension by way of a modification of the contract. The statute of frauds has, clearly, nothing to do with the case. . . .

The judgment should, therefore, be affirmed.

All the judges were for affirmance, except SELDEN, J., who thought the agreement void under the statute of frauds, as not to be performed within a year.

Judgment affirmed.

OLMSTEAD v. LATIMER.

COURT OF APPEALS OF NEW YORK, 1899.

(158 N. Y. 313.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 9,

1896, modifying and, as modified, affirming a judgment entered upon a decision of the court on trial at Special Term.

In August, 1878, one John G. Latimer executed his bond with a mortgage on a lot and building on Atlantic street, Brooklyn, to secure the sum of \$18,000 borrowed by him. The plaintiff subsequently acquired that bond and mortgage. In 1884 Latimer died intestate, seised of the mortgaged premises, leaving a widow and four brothers (the three defendants and one James D. Latimer), his only heirs at law. Letters of administration were issued on the estate of John G. Latimer, and upon settlement of the estate it appeared that the personal estate was exhausted by the payment of the debts and expenses of administration, leaving a deficiency in the amount due for administrator's fees. The deceased left real estate of considerable value, all of which was, prior to the commencement of this action, sold by the three defendants Latimer, as heirs at law, for the aggregate sum of \$57,500, the value of the widow's dower in which was estimated at \$8,426, leaving the net value of the lands sold in the hands of each of the defendants at the time of the trial at \$12,268.50, outside of the mortgaged premises. The latter were conveyed, during the years 1888 and 1889, to Frederick B. Latimer by bargain and sale deeds, each reciting the consideration of one dollar. After Frederick had acquired all the interest of his brothers in the mortgaged premises, he and the plaintiff executed the following agreement [October 15, 1891]:

"We agree that the time for the payment of the Bond and Mortgage for \$18,000 on 201 and 203 Atlantic Avenue, Brooklyn, made by John G. Latimer to the executors of Noah T. Pike and recorded in the Register's office of Kings County in Liber 1425 of Mortgages, page 17, August 24, 1878, being the date thereof, shall be and hereby is extended to May 1, 1895, subject to the same terms and conditions, including tax, insurance and interest clauses, as at present."

In April, 1892, a fire occurred in the buildings on the mortgaged premises, by which they were partially injured. In an attempt to restore the buildings they collapsed and became a total loss. By this accident the value of the mortgaged premises fell below the amount of the mortgage. Thereafter, the plaintiff instituted this action to foreclose the mortgage and hold the defendants, as heirs at law of the original bondsman and mortgagor, liable for any deficiency. The trial court held the defendant Frederick liable for $\frac{1}{2}$ of any deficiency, and the other defendants not liable. From this decree the plaintiff and the defendant Frederick appealed to the Appellate Division, the former seeking to hold all the defendants, the latter to be relieved from liability. The court modified the

judgment by increasing the liability of the defendant Frederick to one-quarter of any deficiency that may arise on the foreclosure sale, and in all other respects affirmed the judgment.

PARKER, Ch. J. The defendants Latimer, as heirs at law of the mortgagor, were respectively liable under section 1843 of the Code for the debts of the said mortgagor decedent to the extent of their interest in the real property that descended to them from him. The premises covered by the mortgage were primarily liable to pay the mortgage debt. As there was no personal estate the defendants were secondarily liable, and they were properly made parties in the action of foreclosure by virtue of section 1627 of the Code, which provides that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him" of any deficiency. The judgment as it comes to us decrees that the defendant Frederick B. Latimer shall pay one-quarter of the deficiency, but it has been held that the effect of the conveyance of the premises to the defendant Frederick by his brothers in the years 1888 and 1889, together with the fact that he informed the plaintiff of such conveyance, and thereafter made an agreement to extend the time of payment of the bond and mortgage, had the legal effect of making Frederick the principal debtor and his brothers sureties, and hence that the effect of the agreement, extending the time of payment, operated to release the sureties from all liability to the plaintiff on account of the indebtedness evidenced by the bond. Assuming, but not deciding, that the effect of the conveyance, and that which subsequently happened, was to change the obligation of the defendants other than Frederick towards the plaintiff, from that of principals to that of sureties, we come to the question whether the agreement to extend the time of payment was invalid for want of consideration.

There are several decisions in this court in which the question has been considered, and they are in harmony with one another. In *Kellogg v. Olmsted*, 25 N. Y. 189, the action was on a promissory note by the transferee of the payee. The answer alleged that after the note became due it was mutually agreed between the holder thereof, the payee, and the defendants, "that in consideration that the defendants would keep the principal sum of the said note until the first day of April, 1857, and pay the same with interest on that day, he, the said payee, would extend the time of payment of the principal of said note until the first day of April, 1857; that the said defendants then and there assented to such proposition, and then and there agreed to and with said Covil to keep said principal sum

of said note until the first day of April, 1857, and to pay the same with interest on that day." On the trial of the action the referee excluded evidence offered by the defendants to establish the defense so specially set up, and exceptions were taken thereto that presented the question to this court. It was held that an agreement by a creditor to postpone payment of a debt until a future day certain, without other or further consideration than the agreement of the debtor to pay the debt with interest, is void for want of consideration; the court citing, in support of its position, *Miller v. Holbrook*, 1 Wend. 317; *Gibson v. Renne*, 19 Wend. 399; *Pahodie v. King*, 12 John. 426; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 John. 433.

A dissenting opinion was written by Judge Davies, who two or three years later wrote the principal opinion in *Halliday v. Hart*, 30 N. Y. 474. In that case the action was brought to recover against the maker and two indorsers on a promissory note. The indorsers defended on the ground that the plaintiff had, for a valuable consideration, and in writing, extended the time of payment for a period of some months, and claimed that the effect of such extension was to discharge the sureties from liability. The authorities bearing upon the question were very carefully considered, and the court decided that a partial payment by the maker on account of an overdue note is not a valid consideration for a promise of forbearance as to the residue so as to discharge the indorsers. A concurring opinion was written by Judge Hogeboom, in which he says: "The sureties were not discharged. There was no *valid* agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder."

The next case in this court was *Lowman v. Yates*, 31 N. Y. 601. The action was upon a bond given by Ely, as principal, with Parmenter, as surety, conditioned that Ely should, before a given date, take up and deliver to the plaintiff two mortgages executed by him, amounting to ten thousand dollars. The action was brought against the personal representatives of the surety, the principal having died. The defense relied upon was that the plaintiff, without the surety's consent, took from the principal four negotiable promissory notes, to be applied upon the bond for the payment in the aggregate of about seven thousand dollars of principal, three, three and one-half, four and five years after date, and indorsed the same upon the bond, thereby extending the time of payment and discharging the defendant as surety. The court, recognizing the

principle that a creditor by a valid and binding agreement between himself and the principal debtor, extending the time of payment without the consent of the surety, thereby discharges the latter from liability, said that in order that an agreement shall accomplish that result it must have a sufficient consideration, so as to prevent the prosecution of the debt by the owner, and to prevent the surety from compelling him to enforce it. It was claimed by the plaintiff that he was induced to enter into the agreement, and take notes extending the time of payment, by the fraudulent representations made by the principal debtor, and it was held that the court properly left it to the jury to determine whether the notes were imposed on the plaintiff by fraud, and if so that their receipt by the plaintiff under the agreement did not operate to extend the time of payment of so much of the amount of the bond as their face value represented. It was also held that the judge properly charged that in any event the extension of the time of payment did not discharge the surety as to the residue of the bond beyond the amount of the notes. In *Parmelee v. Thompson*, 45 N. Y. 58, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the Supreme Court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs and have until the ensuing December to pay the note; that the costs were paid and the suit discontinued, after which the plaintiff became the owner of the note and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: "It is competent for the parties, by a parol agreement, to enlarge the time of performance of a simple contract. . . . But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the future, is not a sufficient consideration to support such promise." (Citing *Miller v. Holbrook*, *Gibson v. Renne* and *Kellogg v. Olmsted*, *supra*.)

In *Powers v. Silberstein*, 108 N. Y. 169, the action was brought upon a promissory note made by the firm of Joy & Bowman and indorsed by the defendant Silberstein, who alone answered, setting up as a defense that the note was indorsed by him for the accommodation of the makers, and that the time of payment was extended

by an agreement, made without his consent, between the makers and the plaintiff. The plaintiff had judgment in the trial court, which was affirmed at the General Term, but reversed in this court on the ground that there was evidence tending to establish that the plaintiff, after the maturity of the note, agreed with the makers, Joy & Bowman, to forbear the collection of it if they would continue plaintiff's son in their employment, and that Joy & Bowman consented and did retain him in their service upon this consideration. In the course of the opinion the court cited *Lowman v. Yates*, *supra*, upon the proposition that a mere indulgence by a creditor of the principal debtor will not discharge the surety, and that the agreement for an extension, made without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal, but argued that the plaintiff did not deny that the employment of his son was an inducement to the original loan, or that the subject of his continuing employment was referred to in his conversation with the makers of the note after maturity, and that, taken in consideration with the fact that the loan was allowed to remain standing for three years after the maturity of the note, presented a question for the jury as to whether there was an extension of the time upon a good consideration.

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The rule laid down by them has been followed in many cases in the trial courts, and among them may be found the comparatively recent cases of *Manchester v. Van Brunt*, 19 N. Y. Supp. 685, and *Babcock v. Kuntzsch*, 85 Hun, 615. The reasons assigned by the learned justice who wrote for the Appellate Division, in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in *Kellogg v. Olmsted*, *supra*, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned.

The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the Special Term modified by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants, Frederick B. Latimer, Henry A. Latimer and Brainard G. Latimer, each pay to the plaintiff one-quarter of any

deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs.

All concur.

LOOMIS v. DONOVAN.

SUPREME COURT OF JUDICATURE OF INDIANA, 1861.

(17 *Ind.* 198.)

Appeal from the Cass Common Pleas.

PERKINS, J. Suit to foreclose a mortgage, which was the sole written evidence of the debt, no note or bond having accompanied the mortgage. The suit is against W. A. Parry and C. C. Loomis. The mortgage was given by Parry to Donovan. After it became due, Donovan agreed by parol with Parry and Loomis, all three being together, that if Parry would sell, and Loomis would purchase Parry's equity of redemption in the mortgaged premises, assume Parry's mortgage debt, and pay \$50 down upon it, he would extend the time of payment of the balance, and the foreclosure, until July 1, 1861. The agreement was concluded between the three. Loomis made the purchase of the equity of redemption, assumed Parry's mortgage debt, and paid \$50 upon it.

Donovan did not delay the foreclosure suit till July 1, 1861, and Loomis, one of the defendants, sets up the foregoing facts in answer to the action. The court below held them no bar, and gave judgment of foreclosure and sale. Was the ruling of the court right? This is the only question.

The point is this. A creditor who holds a sealed obligation for the debt, past due, agrees with the debtor, by parol, for a valuable consideration, viz., that he procure a third person to perform an act, that he will extend the time of payment; and he agrees, in like manner, with such third person, that, if he will do the proposed act, time shall be given on the debt, as to him. Here, then, is an agreement by parol, with an existing and, substantially, a new debtor, for a consideration which is executed, at least in part, to give time, as against both of them, on an existing bond debt, till a given day, and the question is, will a court of equity give effect to it? It does not involve the question of discharging sureties; but of how far the debtor and a new surety can have the benefit of an agreement for time. (See, as to giving time where sureties are concerned, *Halstead*

v. *Brown*, *post*, p. 202; and where they are not, *Mendenhall v. Lenwell*, 5 Blackf. 125.)

It is settled law that giving time to the principal by a binding contract, though made after breach, discharges the surety. Why? Because it is said that the surety has two rights under the contract as originally made, at common law, viz., to pay off the debt as soon as it becomes due, or at any time afterward, and then immediately sue the principal to recover back his money; or, to apply to chancery for the collection of the debt by the creditor, in which suit the creditor and principal debtor are brought before the court immediately; and that a valid contract by the creditor, extending the time of payment to the principal, ties up the hands of the former, so that he can not enforce payment of the contract when thus brought into chancery, and that the surety can not enforce it, and, hence, is injured by the act of giving time. (Leading Cases in Equity, Vol. 2, Part 2, p. 362, side p. 716.) It is evident that equity will not enforce a contract upon which time has been validly given, till the extended time has elapsed. And this doctrine of discharging sureties because of the extension of time to the principal, in a contract which forbids its enforcement within such time, was of chancery origin (*Dickerson v. The Board, &c.*, 6 Ind. 128), and belonged intrinsically to equity. (1 Eden on Injunctions, 3d ed., p. 65.) And it made no difference that time was given by parol upon a contract under seal. (Leading Cases in Equity, Vol. 2, Part 2, top p. 369; Burge on Suretyship, p. 212.) Later, the doctrine was applied at law to the extent of releasing the sureties, but not to the extent of suspending the action at law against the principal, where the new contract was made after breach of the original. (*Dickerson v. The Board, &c.*, *supra*. But see *McComb v. Kittridge*, 14 O. Rep. 348. And see *Rigsbee v. Bowler*, *ante*, p. 167.) Perhaps equity would grant an injunction to restrain the action at law against the principal till the extended time had elapsed. (Burge on Suretyship, p. 206.) "This doctrine (says the Supreme Court of Vermont), which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it." (*Austin v. Darwin*, 21 Vermont, 38.) And such are the contracts which chancery was originally created to enforce; but chancery will never lend its aid to enforce a contract "in opposition to conscience or good faith" (*Creath's Adm'r v. Sims*, 5 How. (U. S.) Rep. 192.) It would be in opposition to conscience and good faith to enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time.

A suit to foreclose is an appeal to the equity powers of the court. The present is a chancery suit. It is brought in bad faith, in fraud of the rights of Loomis. The plaintiff does not come into court with clean hands. He has not done equity. His suit, upon the defense set up being established, should be dismissed without prejudice.

It is a general proposition of law, that parol evidence may be given to rebut an equity. (See *Page v. Lashley*, 15 Ind. 152.) Browne, in his valuable work on the Statute of Frauds, says: "And while it is not accurate to say that the verbal agreement will be always admitted as a defense in those courts (equity courts), since that would be to relieve them from the binding power of the statute, it seems to be clear that they will not lend their aid to enforce and perfect a legal right which the plaintiff sets up against his conscientious duty, under a verbal contract interposed on the part of the defense." (P. 133.)

Per Curiam.—The judgment is reversed, with costs.¹

MILLS v. TODD.

SUPREME COURT OF JUDICATURE OF INDIANA, 1882.

(83 Ind. 25.)

From the Ripley Circuit Court.

BICKNELL, C. C. The appellees brought this suit against the appellants to foreclose a mortgage, claiming that the writing sued on, although in form an absolute deed from the appellants to the appellees, was intended to secure \$1,400, the purchase-money of certain land, and \$400 for another debt.

The land had formerly belonged to Robert Mills, deceased, who was the husband of the appellant Mary Mills, Sr., and the father of the appellants Joseph Mills and William Mills; it had been sold to one Wheeler, upon a judgment against Robert Mills, and the appellants were seeking to repurchase it for \$1,400; they agreed with the appellees that if the latter would advance the \$1,400, they should have a mortgage on the land to secure the same, and also to secure said \$400, payable in two years, with interest at nine and a half per cent. Under this agreement the appellees advanced the

¹*Trayser v. Trustees of Indiana Asbury University*, 39 Ind. 556 (1872), accord.

\$1,500; it was paid to Wheeler; he conveyed the land to the appellants on March 30th, 1877; and they conveyed it to the appellees by an absolute deed, dated June 18th, 1877. There was evidence tending to show that, by the agreement, the appellees were to execute a bond to the appellants for a reconveyance of the land on the repayment of \$1,800 and interest, in two months from the date of the bond, but there was no proof of the execution of the bond, and, on the 2d of August, 1879, more than two years after the date of the deed, the principal and all the interest being unpaid, this suit was commenced.

The issues joined were tried by the Court, who found for the appellees, that they were entitled to foreclosure for \$2,052; the appellants' motion for a new trial was overruled; judgment was rendered upon the finding, and this appeal was taken.

Several errors were assigned, but only one is discussed in the appellants' brief; the others are therefore waived.

The error relied on in the brief is, sustaining the appellees' demurrer to the second paragraph of the appellants' answer.

That answer is pleaded to the entire complaint. The first paragraph of the complaint avers that the deed was executed to secure the payment of \$1,800, of which \$1,400 was the purchase-money of said land, paid by plaintiffs, and that there is now due and unpaid, of said indebtedness, the sum of \$2,200.

The second paragraph of the complaint states that Wheeler owned the land, which appellants desired to buy for \$1,400, and that plaintiffs held a judgment against the estate of said Robert Mills for \$500, and that the appellants agreed that if the appellees would lend them \$1,400 for the purchase of said land, they would mortgage the same to the appellees, to secure said \$1,400, and also \$400 of said judgment, and ten per cent. interest for two years and until paid, and that the appellees accordingly advanced to appellants said \$1,400, which they paid to said Wheeler, and took from him a deed for said land, and then, on June 18th, 1877, executed to appellees the instrument sued on, to secure the payment of the aforesaid sum of money. The averment in each of these paragraphs is substantially that the deed was intended as a mortgage to secure \$1,800 and the interest, in all \$2,200, and that, although two years had elapsed before suit brought, yet the entire principal and interest remains unpaid.

These matters were fully put in issue by the first paragraph of the appellants' answer, which was the general denial.

The second paragraph of the answer states that the deed was not executed to secure the money and ten per cent., but to secure the consideration therein expressed, and six per cent., which six per

cent. was paid before suit brought, and that, on April 1st, 1879, the appellees agreed that if appellants would pay to them six per cent. interest yearly on said \$1,800 they would extend the time of payment two years from April 1st, 1879, and that appellants, in consideration of such extension of time, faithfully undertook and promised to pay the appellees said six per cent. yearly, which they are ready to do as the same shall mature. Wherefore the defendants say the money secured by said conveyance is not yet due.

So far as this plea alleges that the interest was to be six per cent., and that no interest was due at the commencement of this suit, it is embraced in the general denial already pleaded. So far as it states an agreement in April, 1879, to extend the time of payment two years further, in consideration of the appellants' undertaking to pay six per cent. interest yearly, it amounts to nothing; this undertaking is not averred to have been in writing and was not to be performed within a year, and there was no consideration for it; the money, already past due, bore six per cent. interest, without any agreement. In substance, the plea states an agreement not to sue for a limited time, and states no consideration therefor; but such an agreement, even if founded on a sufficient consideration, can not be pleaded in bar of an action within the time. (*Irons v. Woodfill*, 32 Ind. 40; *Mendenhall v. Lenwell*, 5 Blackf. 125; 33 Am. Dec. 458; *Berry v. Bates*, 2 Blackf. 118; *Newkirk v. Neild*, 19 Ind. 194.) The Court, therefore, committed no error in sustaining the demurrer to the second paragraph of the appellants' answer. Its judgment should be affirmed.¹

Per Curiam.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

¹ *Ayers v. Hamilton*, 131 Ind. 98 (1891), *accord*. *Contra*, that a valid agreement to extend the time of payment enlarges the period of redemption and suspends the right of foreclosure: *Schoonhoven v. Pratt*, 25 Ill. 379 (1861); *Union Central Life Ins. Co. v. Bonnell*, 35 Oh. St. 365 (1880); *Goodall v. Boardman*, 53 Vt. 92 (1880). And see *Seymour v. Bailey*, 66 Ill. 288, 306 (1872), and *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123 (1867).

CHAPTER IV.

ASSIGNMENT OF MORTGAGE.

SECTION I. MODE OF TRANSFER.

LAWRENCE v. KNAP & MENZEY.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1791.

(1 *Root*, 248.)

Petition in chancery, shewing that Lownsbury was indebted to Plat, for which he gave his note and a mortgage as collateral security, which deed was recorded. Plat was indebted to Hunter, and for a valuable consideration assigned said note to him [and] at the same time delivered him said mortgage-deed. Hunter assigned said note to the petitioner for a debt which he owed him, and also delivered to him said mortgage.

The petitioners attached the mortgaged lands and had them set off to them on executions, as Plat's estate, in satisfaction of debts due from Plat to them. The petitioner had recovered judgment in ejectment for said lands in Plat's name and had taken possession, and now prays that the petitioners may be compelled to release to him their right and title to said premises, or that he be in some way quieted in his right to said lands.

This cause was twice argued. The court now granted the petition and passed a decree against Menzey (Knap having deceased pending the suit) for him to release all his right to said mortgaged premises, upon the principle that the petitioner owned the debt for which said mortgage was given as collateral security—that he who is entitled to the debt, which is the principal thing, hath right to all the collateral securities given to ensure the payment of the debt; especially as in this case, where the actual delivery of the mortgage accompanied the assignment of the note, of which the petitioners had notice.

Afterwards a petition was brought against the heir of Knap and a similar decree passed against them, notwithstanding they had purchased the equity of redemption of Lownsbury, which might entitle them to redeem, but was no bar to the petition.¹

¹ *Austin v. Burbank*, 2 Day, 474 (1807).

GREEN v. HART.

COURT OF ERRORS OF NEW YORK, 1806.

(1 *Johns.* 580.)

Aylmar Johnson, on the 2d September, 1796, being justly indebted to William Green in the sum of \$1,551.64, gave him a promissory note for that sum, payable to him, or his order, at the Bank of New York on the 1st of May, 1798. To secure the payment of this note, Jonas Platt, who was a trustee of Johnson, executed a mortgage of two lots of land in Corley's Manor, which was duly registered.

In October, 1796, Green endorsed the note to the respondent, and delivered it to him, with the mortgage, which he holds. The respondent filed his bill against the appellant and others, stating the above facts, and that he paid a valuable consideration for the note and mortgage, and that, by non-payment of the money, he was seised of the mortgaged premises; requiring an answer to every part of the bill, and praying that the money might be paid, or the premises sold in the usual manner.

The respondent, on the 3d of March, 1798, gave a receipt to Green acknowledging that he received the note of Johnson as collateral security for the payment of Green's note to him for \$1,491.11, payable the 3d of May, 1798, and stating that the note of Johnson was secured by a mortgage which was "not assigned."

Johnson, in his answer, insisted that the mortgage had not been assigned to Green, who stated that the sum really lent to him by the respondent was only \$1,035; the residue of the note being for usurious interest. There was no satisfactory evidence of the usury; and the chancellor decreed a sale of the mortgaged premises, and an account to be taken of what was due on Johnson's note, and directed the proceeds to be applied to the payment of what was due and the costs. From this decree Green appealed to this court.

The reasons for the decree were assigned by

THE CHANCELLOR¹:

As to the second point, whether the respondent acquired any right to the mortgage in question by the transfer of the note:

The note given to the appellant by Aylmar Johnson was coeval, and part of the same transaction, with the mortgage in question, and the only reason why the agency of Jonas Platt was at all connected with it appeared to have been because he held the mortgaged lands, which were intended as collateral security for the payment

¹A portion of the opinion, relating to the question of usury, is omitted.

of the debt due from Johnson, as his trustee. Johnson, therefore, in every equitable point of view, was both the maker of the note and mortgagor, as the mortgage was executed, by his direction or procurement, by his trustee, who has disclaimed all other interest than such as he holds as trustee, and respecting whose interest the parties do not differ.

The endorsement of the note by the appellant to the respondent was accompanied by the delivery of the mortgage. If the note was satisfied, it involved the satisfaction of the mortgage, for the existence of the mortgage, by express reference, depended upon that of the note. In its essence, and by act and operation of law, it was parcel of the same contract, executed at the same time, directed to the same object, and to be satisfied by the same means.

The doctrine laid down by Lord Mansfield in the case of *Martin, ex dem. Weston v. Mowlin*, 2 Burr. 969, which was cited in argument before me, applies to this point with much force. The question in that case arose on a bill between the representatives of the real and the representatives of the personal estate of the testator. In defining the species of property of a mortgagor, Lord Mansfield observed: "*A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will drag the land after it, as a consequence; nay, it would do it, though the debt were only forgiven by parol; for the right of the land would follow, notwithstanding the statute of frauds.*"

The receipt of Ephraim Hart designates the mortgage as delivered, but not assigned. This, it appears to me, was merely descriptive of its situation at the time of its delivery. It had no formal assignment; but if it was intended not to be assigned, its delivery to the respondent is inexplicable, unless the slight ligament connecting the note with the mortgage is the reason, as alleged by the appellant. But that circumstance would appear to intimate that the parties intended they should remain inseparable.

I think, however, that the transfer of the note, and the delivery of the mortgage, are decisive on this point, and that the respondent took the latter as a legal incident of the transfer of the debt.

SPENCER, J., delivered the unanimous opinion of the court.

On the argument it has been insisted by the appellant's counsel,

"See Judge Trowbridge's elaborate argument, controverting Lord Mansfield's view, in 8 Mass. 551 (1812), given in part, *supra* p. 21.

1st. That the respondent having, in his bill of complaint, interrogated the appellant as to the consideration for the note and mortgage, his answer, in relation to the usury, becomes evidence in the cause, and is not disproved.

2d. That it was not Green's intention to transfer the mortgage to Hart; and had it been so, nothing passed by the mere delivery, as the statute to prevent frauds and perjuries requires a deed or note in writing.

3d. That the decree is erroneous in directing the whole amount of Johnson's note and mortgage to be paid to Hart, inasmuch as it was a security to him for \$1,491.11 only, the difference between which and Johnson's note being clearly due to Green.

With respect to the first point, it is to be observed that the respondent was in possession of Johnson's note as endorser; and the fact of the absolute endorsement by Green was *prima facie* evidence of a full and adequate consideration paid for the note. The respondent was under no necessity of inquiring into it; but he did allege that the consideration was a full and valuable one. This the appellant might have denied; and had it been incumbent on the respondent, he must have proved his allegation, or failed in the suit. The burthen of showing that the consideration was illegal or inadequate rested on the appellant. When he goes into a charge of usury he departs from the question put to him, which admitted only of an affirmative or negative answer; and it was wholly immaterial whether it was the one or the other. I view, therefore, the appellant's answer, charging usury, as insisting on a distinct fact, by way of avoidance. The respondents having replied, and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well established principle in Chancery proceedings, and will be found recognized in every treatise on evidence in that court.

Courts of equity consider mortgages according to the essential nature of contracts, and give them operation according to the intention of the parties: the debt is, consequently, there esteemed the principal, and the land the incident; and whenever the debt is discharged, the interest of the mortgagee in the land ceases of course. There is, then, a manifest distinction between absolute estates in fee and conditional estates for securing the payment of money. Mortgages are not now considered as conveyances of lands within the statute of frauds; and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. (Powell, 3d edit., Mort. 54; Barnard, 90; *Richard v. Sims*, 2 Burr. 979.) If, however, a mortgage was within the statute, the circumstances of this case would exempt it from its operation. In case of

the payment of the money secured by mortgage, in equity a trust arises for the benefit of the mortgagor; so, where the debt thus secured is transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt. (2 Anstruther, 438.) In the case of *Martin v. Mowlin*, 2 Burr. 979, Lord Mansfield lays it down as an established principle, that the assignment of the debt will draw the land after it; and I cannot agree that this was an *obiter dictum* of the judge.

In the present case the mortgage was delivered to the assignee of the debt. Had it not been delivered, nor anything said about it, I should have considered the respondent, on the failure of Johnson to pay the note, entitled to the aid of the mortgage. It was competent to the parties to agree that the mortgage should not be resorted to by the holder of the note; but the proof of such agreement lies on the appellant, and it should be explicit. The receipt furnishes no evidence of such agreement; it describes the real situation of the mortgage as not assigned. But this expression falls far short of an agreement that it was not to be assigned. It does not appear that the appellant had any rights prejudiced by the assignment of the mortgage; and it is impossible to evade the force of the fact of his depositing it in the respondent's hands. It speaks a language incapable of being misunderstood, and is decisive of the question. An issue to investigate the intention of the parties, on that act, would have been useless. I therefore think that the respondent had an equitable interest in the mortgage equivalent to the amount of the principal and interest of his note against Green.

I shall be very brief on the last point, because I understand the chancellor as saying, in assigning his reasons, that the question of distributing the fund to be produced by the sale is yet before him. The master's report furnishes him the necessary data on which to make a just distribution; and it would be unnecessary to give directions on that subject, the respondents not claiming anything beyond the principal and interest of the appellant's note, and his costs, to which I think him well entitled. The decree ought to be affirmed with costs. I cannot think, however appearances may be, that the respondent, or his counsel, considered the points now decided as necessarily or absolutely adjudged on the former appeal; and I am, therefore, disinclined to allow anything beyond the taxable costs.

Judgment of affirmance.

¹*Southerin v. Mendow*, 5 N. H. 420 (1831); *Whittemore v. Gibbs*, 24 N. H. 484 (1852); *Ord v. M'Kee*, 5 Cal. 515 (1855), *accord*.

WARDEN v. ADAMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1818.

(15 *Mass.* 233.)

This was a writ of entry by the said Warden, as assignee of a mortgage made by the said Adams to one John Earle.

The action came on for trial before the Chief Justice at the last April term in this county, and the parties agreed that the following facts should be considered as proved in the case, viz.: The said Adams made and executed the mortgage deed declared on, conditioned for the payment of six promissory notes made by the said John and one Lewis Adams, payable to the said Earle or his order. Afterwards the said Earle became insolvent, and from the 15th of November to the 5th of December, 1815, was in failing circumstances. Previously to the assignment hereafter mentioned Earle had pledged one of the said notes to a person not interested in this suit, but did not assign or deliver over to him the mortgage deed as security, and he afterwards redeemed the note, which he had since transferred to one Sewall Hamilton, but not until after the execution of the assignment to Warden. On the 20th of November, 1815, he deposited with a scrivener two of said notes, and also the mortgage deed, for the purpose of having an assignment thereof made to Warden to secure a debt due from Earle to him.

On the 27th of the same November, Earle endorsed one of the said six notes to said Hamilton, as part security for a debt due him from Earle, and at the same time assigned said mortgage deed and the premises therein mentioned to Hamilton, by his deed duly acknowledged and recorded on the same day: the said assignment being made on a separate piece of paper, and referring to the mortgage.

On the 28th of said November, the said Earle executed an assignment of said mortgage deed, on the back thereof, to said Warden, as security for his said debt to him and of some debts due from Earle to certain other persons, which Warden was to assume. This assignment was not acknowledged or recorded. The mortgage deed and the two notes, left with the scrivener for the purpose of having an assignment made, remained in the scrivener's hands until the actual execution of the said assignment to Warden. Hamilton recovered judgment for possession of the mortgaged premises against Adams, and possession was delivered to him by the proper officer: and Adams afterwards entered and continued in possession by a parol lease from the assignee of Hamilton.

The demandant offered to prove, by the testimony of Earle, that when he made the assignment to Hamilton, and prior to that time, Hamilton knew that the original mortgage deed was in the hands of the scrivener, for the purpose of an assignment being made to the demandant, for securing the payment of the two notes transferred to him as aforesaid.

But the Chief Justice, being of opinion that the demandant could not maintain his action, in consequence of the prior assignment to Hamilton, under which the tenant is in possession, and also that Earle was not a competent witness to prove the fact for which he was offered, if such fact were material, directed a nonsuit, which was to be set aside and a new trial granted, if upon the above facts, together with the said knowledge of Hamilton, this action could be maintained.

Burnside and Bangs, for the demandant.—The delivery of the mortgage deed, together with the notes endorsed, for the purpose specified, amounted to such an equitable assignment as the law will protect. It is said by Lord Mansfield in the case of *Martin v. Moulin*, 2 Burr, 978, that “a mortgage is a charge upon the land; and whatever would give the money will carry the estate along with it, to every purpose. The estate in the land is the same thing as the money due upon it.” “The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds.” This doctrine is recognized and confirmed by the Supreme Court of New York in the case of *Green v. Hart*, 1 Johns, 580; see also *Powell on Mortgages*, 186 to 190; 11 Mass. Rep. 475. Then the second assignment by Earle to Hamilton, with the knowledge of the latter of the prior transaction, was fraudulent and void as to the demandant. And if we should be debarred from fixing this knowledge upon him, we contend that he must be presumed, from the facts found in the case, to have known of the delivery of the deed to the scrivener, and the purpose of such delivery. The absence of the mortgage deed should have put Hamilton on his guard; and he is chargeable with fraudulent motives in taking an assignment under such circumstances. It can make no difference that but two of the six notes were endorsed to the demandant. The mortgage was given as security for these two notes, and might legally and equitably be assigned with them.

That Earle was a competent witness, we refer the court to the cases of *Loker v. Haynes*, 11 Mass. Rep. 498; *The Inhabitants of Worcester v. Eaton*, *ibid.* 368, and *Hill v. Payson & al.*, 3 Mass.

Rep. 559. He was not offered to impeach his own deed, but merely to postpone the security intended to be given by it.

Newton for the tenant.—The assignment to Hamilton was prior to that to the demandant, and being in every circumstance conformed to the requisitions of the statute, must have the preference. The assignment of a mortgage is a conveyance of the rents and profits. (11 Mass. Rep. 474, *Goodwin v. Richardson, Adm.*) Then the assignee has such an interest in the land as cannot pass without writing.

The dictum of Lord Mansfield in the case of *Martin v. Mowlin* has been completely put down by Judge Trowbridge in his tract upon mortgages (8 Mass. Rep. 557, and *seq.*); and it may well be presumed that if the judges, who agreed in the decision in the case of *Green v. Hart*, had read that tract, they would not have given the opinion they did. That decision was, however, in chancery, and is no precedent for the government of this court.

If the fact proposed to be proved by the testimony of Earle were legally in evidence, it would not better the demandant's case. (See 12 Mass. Rep. 523; 11 Mass. Rep. 312; 5 Mass. Rep. 133.) Hamilton had the first legal assignment of the mortgage, and there was no fraud in the transaction: for Earle had a right to prefer making him secure, rather than another. All that the demandant can complain of amounts to nothing beyond a violation of a promise or undertaking, on the part of Earle, to give him the preference. (5 Mass. Rep. 144.)

By the Court. By force of our statutes regulating the transfer of real estates and for preventing frauds, no interest passes by a mere delivery of a mortgage deed without an assignment in writing and by deed.

An assignment, made by a separate deed, without the delivery over of the original mortgage deed, conveys all the interest of the mortgagee, and makes the grantee the assignee of the mortgage.

The knowledge imputed in this case to Hamilton, the assignee, of an intention on the part of Earle, the mortgagee, to assign the mortgage to the demandant, does not impair the tenant's title: he being a *bonâ fide* creditor, and having a right, by his vigilance, to secure his demands in this way: just as he would have had by an attachment, although he might know that another creditor intended to make an attachment, and had taken incipient measures therefor.

The nonsuit is not set aside.¹

¹*Smith v. Kelley*, 27 Me. 237 (1847), *Adams v. Parker*, 12 Gray (Mass.) 53 (1858); *Cottrell v. Adams*, 2 Biss. (Ill.) 351 (1870); *Williams v. Teachey*, 85 N. C. 462 (1881), *accord*.

JACKSON v. BRONSON.

SUPREME COURT OF JUDICATURE OF NEW YORK, 1822.

(19 *Johns.* 325.)

Ejectment for land in Onondaga, tried before Mr. Justice Yates at the Onondaga Circuit in June, 1821. The lessor of the plaintiff proved a title under Abijah Earl, for a lot of sixty acres, by a deed to him, dated 3d of March, 1801, duly recorded on the same day, and that the defendant was in possession of six acres of the land. The defendant proved a mortgage from Curtis to Earl, dated March, 1801, of the whole lot, to secure payment to the State of \$405.62, and to indemnify Earl. Also, a deed from Earl to the defendant for the premises in question, dated 5th of June, 1801. A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case which was submitted to the Court without argument.

Per Curiam. It is now well settled, that the mortgagee has a mere chattel interest; and the mortgager is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond or personal security for the debt; and the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity.

In the case of *Runyan v. Mersereau*, 11 *Johns. Rep.* 534, it was decided that the mortgager, or a purchaser of the equity of redemption, may maintain trespass against the mortgagee, or a person acting under his license. There the defendant pleaded *liberum tenementum*; and the plaintiff (the purchaser of the equity of redemption) replied, that the freehold was in himself; and there was judgment for the plaintiff. Here the question is, whether Curtis, the mortgager, can maintain an ejectment against Bronson, who appears as a grantee, by deed in fee-simple, under the mortgagee.

We are of opinion that the plaintiff is entitled to judgment.¹

¹*Ellison v. Daniels*, 11 N. H. 274 (1840), *Peters v. Jamestown Bridge Co.* 5 Cal. 335 (1855), *accord.* See also *Merritt v. Bartholick*, 36 N. Y. 44 (1867).

PAGE v. PIERCE.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1853.

(26 N. H. 317.)

WRIT OF ENTRY, brought by the plaintiffs to foreclose a mortgage made by the defendant to Hiram Munger, and which they claim to hold by virtue of the sale and indorsement to them of a note secured thereby.

The case was submitted to the court upon papers exhibited by the parties.

The first was a mortgage deed conveying the premises from the defendant to Hiram Munger for the security of five notes for \$100 each, payable to Munger or order at different times, one of which, being the last payable, was indorsed before maturity to the plaintiffs. The four other notes were, together with the mortgage; assigned by Munger to Pliny Cadwell by an instrument under seal, which was duly recorded. The notes so assigned were afterwards paid by Pierce to Cadwell, who thereupon gave a written discharge of the mortgage, which was also duly recorded on the margin of the mortgage record.¹

WOODS, J. It is settled in this State that the assignment of a debt secured by a mortgage of land is *ipso facto* an assignment of the security also. (*Southerin v. Mendum*, 5 N. H. Rep. 420; *Rigney v. Lovejoy*, 13 N. H. Rep. 247, and cases there referred to.) And it is also settled that the interest of a mortgagee is incapable of being conveyed by him, except in connection with the debt secured by the mortgage, and as a mere incident or appurtenance to it. (*Ellison v. Daniels*, 11 N. H. Rep. 274, and cases there cited.) It was held in *Rigney v. Lovejoy*, before referred to, that the parol assignment of a negotiable note secured by a mortgage, although it did not authorize the assignee to sue for the debt in his own name, carried with it the mortgage interest, and enabled the assignee, by his writ of entry, to assert his claim to the land in his own name.

As a corollary to the doctrine that an assignment of the debt carries with it the mortgage, it has been held that where the debt consists of several bonds or notes the assignment of each operates, *pro tanto*, an assignment of the mortgage. In *Lowe v. Morgan*, 1 Bro. C. C. 268, the mortgagee had assigned to a trustee in trust for three persons who had contributed equal proportions of the money. One of the three brought a bill to foreclose, and took a decree. But the cause stood over to enable him to make the other two parties, be-

¹This brief statement of facts is abbreviated from that given in the report.

cause it was deemed impossible for one to foreclose without the others. In *Cooper v. Ullman*, Walker's Mich. Ch. Rep. 251, it was held that the assignment of one of several notes secured by mortgage carries with it a proportional interest in the mortgage, unless it is agreed between the parties at the time that no interest in the mortgage is to pass to the assignee. In *Stevenson v. Black*, Saxton's N. J. Rep. 338, it was held that where the mortgage is made to secure several bonds, and the mortgagee assigns them to different persons, and the mortgage to one of them, the several assignments of the bonds operate, *pro tanto*, an assignment of the mortgage. And if he to whom the assignment of the mortgage and of one of the bonds is made buys in the equity of redemption, the mortgage is extinguished as to the bond held by him, but will continue as a security for the residue of the bonds. In *Crane v. March*, 4 Pick. Rep. 136, the same general principle is involved in the conclusion to which the court arrived. In *Betz v. Heebner*, 1 Penn. 280, it was decided that an assignee of one of the bonds took the benefit of the mortgage made to secure it, although at the time of the assignment he did not know there was such mortgage; and that he should not be postponed to subsequent assignees of the other bonds, to whom the mortgage likewise was assigned, although the latter did not know that the first-named bond was unpaid. In *Cullum v. Erwin*, 4 Ala. 452, it was also held that an assignment of one of several notes secured by a mortgage was an assignment, *pro tanto*, of the mortgage, and if the property was insufficient security for the whole, such assignee should have a preference over the mortgagee; which preference was not disturbed by a subsequent assignment of the other notes; each of which took priority of lien in the order of its assignment, without regard to the order in which they severally fell due; but that the assignor might at the time of the assignment give a preference to one or more of the assignees.

In *Langdon & a. v. Keith*, 9 Verm. 299, of the several notes secured by the mortgage, all but one was assigned with the mortgage, to one from whom the defendant received them. The material part of the first assignment was in these words: "We do hereby grant, bargain, sell, transfer and make over to said R., his heirs, &c., the above mortgage deed and premises therein described, and the notes in the condition mentioned, except the fifty-five dollar note," &c. The defendant, after he became possessed of the notes and mortgage, made further advances to the mortgager, and took a second mortgage of the same property. And the question was, whether the fifty-five dollar note named in the first mortgage, and excepted out of the assignment, should take precedence of this second mortgage. And it was held that it should not. First, because the defendant was an innocent purchaser, having no notice

that the fifty-five dollar note was unpaid, or that the plaintiffs claimed an interest in the mortgage, which they had in terms fully assigned. Second, because it was clearly competent for the parties to the first assignment to agree as they did agree, that the whole mortgage should pass. Mr. Chancellor Collamer cites the language of the Court in *Wright v. Wright*, 2 Aik. Rep. 212, in these words: "If the mortgagee choose to assign all his interest in the mortgaged premises, to secure but a part of the notes therein assigned by him, he has a right to do so, and in such case, no interest in the premises could remain in him." And the Chancellor concludes that the assignment "clearly conveys the whole mortgage, and all the notes except one." "It is however true," he adds, "that as against Mead (the mortgager), this mortgage may be kept on foot for the security of all for which it was given, until paid by him or legally discharged. The orators may have the right to pay Keith, the defendant, both his mortgages, and redeem as to him and them, and hold the mortgages for all the debts therein mentioned against Mead."

These cases all maintain or admit the principle, that the mortgage is a mere attendant upon the debt, and in the absence of an agreement, express or implied, to the contrary, if the debt be assigned in parcels to different persons, the mortgage will follow and give equal protection to these fragments, into whose hands soever they may pass by any proper mode of transfer. Whether mere priority of assignment affords the note or bond that is the subject of it, the preference asserted in some of the cases, it is not necessary here to decide; because the notes first assigned, in this case, were fully paid, and the property exonerated with respect to them on the fourteenth of December, 1850.

From the principle laid down in *Ellison v. Daniels*, before cited, it might be fairly inferred that the assignment from Munger to Cadwell, on the 18th of January, 1849, conveyed no interest in the mortgage, beyond what was properly appurtenant to the notes then assigned to him, for the reason that Munger had no power to assign, and Cadwell no capacity to take, any interest in the land or the mortgage, except to the extent of securing those notes. But it is not necessary so to decide in this case. And it is not necessary to decide whether an assignment of a mortgage with part of the debt, in the terms used by the parties on the 18th of January, 1849, has or has not the effect of giving priority to the accompanying notes, over those retained by the mortgager; nor whether that priority, having so attached, would be disturbed in favor of a party taking the residue of the notes from the mortgagee, by a subsequent assignment, without notice. These questions, unavoidably sug-

gested by the cases referred to for a different purpose, are not concluded by the decision of the one before us. It may be admitted that the assignment of the mortgage to Cadwell carried the whole mortgage, as in the case of *Langdon v. Keith*, with the qualification admitted in that case. For here is no subsequent purchaser without notice, and no mesne incumbrancer, who by the principles of that case, could interpose between this plaintiff and the security.

But here the plaintiff, the assignee of one of the notes, is entitled, even upon the theory of that case, to an interest in the mortgage. The party against whom he seeks to enforce it is the mortgager himself, and the maker of the note. He did not, like the defendant in *Langdon v. Keith*, advance money upon the land in faith of an assignment of the mortgage to Cadwell, and of Cadwell to himself, and in ignorance that the other note was outstanding and unpaid, which was the strong feature in that case. On the contrary, when he took from Cadwell the formal discharge of the mortgage, he knew it was not paid; that before he could rightfully hold the land, there was a note of \$100 with which he had himself charged it, still outstanding against him, which he must pay. He could not, therefore, have supposed that any discharge which Cadwell could give him would exonerate the land, and without imputing a sinister design to the party, we cannot suppose that he intended, in taking the discharge, to give any such effect to it.

The conclusion therefore is, that the plaintiffs were, from and after December 14, 1850, sole assignees of the mortgage of the premises, by virtue of the purchase of one of the notes secured by it, and the payment of the others, which had been assigned to Cadwell.

When two or more are interested as mortgagees or assignees of a mortgage, it has been held that they are all necessary parties to a bill to foreclose. (*Palmer v. Carlisle*, 1 Sim. & Stu. 433; *Low v. Morgan*, before cited.) But where the interest of all but one has been extinguished, there seems no reason why he may not proceed alone. (*King v. Harrington*, 2 Aiken, 33.) The plaintiffs in this case are joint assignees of the mortgage, and as such are entitled to maintain this action to foreclose the mortgage.¹

Judgment for the plaintiffs.

¹*Phelan v. Olney*, 6 Cal. 479 (1856), *accord*. Compare *Keyes v. Wood*, 21 Vt. 331 (1849).

BARRETT v. HINCKLEY.

SUPREME COURT OF ILLINOIS, 1888.

(124 Ill. 32.)

Appeal from the Superior Court of Cook County; the Hon. Joseph E. Gary, Judge, presiding.

MR. JUSTICE MULKEY delivered the opinion of the Court:

Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the 26th day of February, 1885, brought an action of ejectment, in the Superior Court of Cook County, against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court, without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed.

The evidence tends to show the following state of facts: In 1870 Thomas Kearns was in possession of the land, claiming to own it in fee simple. On August 3 of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave his four notes to Kearns for the balance of the purchase money,—one for \$12,500, maturing in thirty days; three for \$16,875 each, maturing, respectively, in two, three and four years after date, and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878 Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned, by a separate instrument in writing, the mortgage and note to the appellee, Watson S. Hinckley.

This is, in substance, the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself,

they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned.

We propose to state, as briefly as may be, some of the reasons which have lead us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted, that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee simple. To do this, he is bound to show in himself a fee simple title at law, as contradistinguished from an equitable fee. (*Fischer v. Eslaman*, 68 Ill. 78; *Wales v. Begue*, 31 *id.* 464; *Fleming v. Carter*, 70 *id.* 286; *Dawson v. Hayden*, 67 *id.* 52.) Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase a separate writing was given to me,—a full assignment. . . . It was a very explicit assignment, or full assignment of the note and mortgage and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an assignment only, which does not, like the term "deed," or "specialty," signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assign-

ment was under seal, it follows that even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument, and if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is, of course, based upon the fundamental principle that an instrument *inter partes*, in order to pass the legal title to real property, must be under seal.

But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence, there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. *Nemo plus juris ad alium transferre potest quam ipse habet.* That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff, is demonstrable by the plainest principles of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it, by way of mortgage, to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the States of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear, appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do or attempt to do. Indeed, he does not claim through them, nor either of them. Not only so, neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee. Nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it

may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity, or of law, are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. (*Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 *id.* 213; *Chickering v. Raymond*, 15 *id.* 362.) As to the mortgage, it is well settled that could not be assigned, like negotiable paper, so as to pass the legal title in the instrument or clothe the assignee with the immunity of an innocent holder, except under certain circumstances, which do not apply here. (*Chicago, Danville and Vincennes Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton County v. Lubukee*, 51 *id.* 415; *Olds v. Cummings*, 31 *id.* 188; *McIntyre v. Yates*, 104 *id.* 491; *Fortier v. Darst*, 31 *id.* 213.) But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. (2 Washburn on Real Prop., p. 115, and authorities there cited.) Yet the assignors in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that by virtue of the assignment the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is, perhaps, no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common law courts of Eng-

land, and which has obtained, with certain limitations, in most of the States of the Union, including our own, in which the common law system prevails.

In *Carroll v. Ballance*, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition,—citing Coote on Mortgages, 339; *Blaney v. Bearce*, 2 Greenlf. 132; *Brown v. Cramer*, 1 N. H. 169; *Hobart v. Sanborn*, 13 *id.* 226; *Northampton Paper Mills v. Ames*, 8 Metc. 1. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by a mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *jus in re* as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham v. Pfleger*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law, the owner of the fee, having in the *jus in re* as well as the *jus ad rem*." In *Finlon v. Clark*, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval. (*Taylor v. Adams*, 115 Ill. 574.)

Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mort-

gagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was, of course, necessary, to make his title available in a court of law.

In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them, respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the States, and the failure of the courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject is the fact that in many of the States the common law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defence.

Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has, in many of these States, entirely superseded the legal one. Thus, in New York it is said, in the case of *Trustees of Union College v. Wheeler et al.*, 61 N. Y. 88, that "a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon, the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that State that ejectment

under the code will not lie, at the suit of the mortgagee, against the owner of the equity of redemption. (*Murray v. Walker*, 31 N. Y. 399.) In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee, before foreclosure, without an assignment of the debt is, in law, a nullity. (*Jackson v. Curtis*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; *Jackson v. Willard*, 4 Johns. 41.) And this court seems to have recognized the same rule as obtaining in this State, in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental, that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor containing apt words of conveyance, the title, at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. (*Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton*, 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 40.) It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In 4 Wait's Actions and Defences, page 565, the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, Pomeroy, in his work on Equity Jurisprudence (vol. 3, page 150), in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death, intestate, it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator."

We have already seen, that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper; but.

on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even to a third party, by deed, with apt words of conveyance, and the fact that it is, in form, an assignment, will make no difference. (2 Washburn on Real Prop. 115, 116.) Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name, for his own use; or the action might be brought in his name, for the use of a third party owning the indebtedness. (*Kilgour v. Gockley*, 83 Ill. 109.) So in this case, if the action had been brought in the name of Kearns' heirs, for the use of Hinckley, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this State precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact, that the equitable theory of a mortgage has, in process of time, made in this State, as in others, material encroachments upon the legal theory, which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. (*Hall v. Lance*, 25 Ill. 250, 277; *Emory v. Keighan*, 88 *id.* 482.) As a result of this doctrine, it follows that in ejectment by the mortgagor, against a third party, the defendant can not defeat the action by showing an outstanding title in the mortgagee. (*Hall v. Lance*, *supra*.) So, too, courts of law now regard the title of a mortgagee in fee, in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the Statute of Limitations, the mortgagee's title is extinguished by operation of law. (*Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 *id.* 44; *Gibson v. Rees*, 50 *id.* 383.) Hence the rule is as well established at law as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment, that the plaintiff show in himself the legal title to the property, as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title, he may, under all circumstances, maintain the action,—and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests,—that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in pay-

ment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well settled principle, that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, can not maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who hold the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. (*Cottrell v. Adams*, 2 Biss. 351; 9 Myers' Fed. Dec. 240.) The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer v. Hadduck*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.¹

Judgment reversed.

¹See *Torrey v. Deavitt*, 53 Vt. 331 (1881); *Jordan v. Cheney*, 74 Me. 359 (1883).

CHAPTER IV. (*continued.*)

SECTION II. EFFECT OF TRANSFER.

MATTHEWS v. WALLWYN.

HIGH COURT OF CHANCERY, 1798.

(4 Ves. 118.)

Thomas Matthews, being tenant for life of real estates, applied to Wallwyn Shephard, who was his solicitor, to procure him the sum of 2000*l.* Shephard accordingly procured John Baker to advance that sum upon the mortgage of the estates, of which Matthews was tenant for life, and an assignment of a policy of insurance for 2000*l.* made by Matthews for his life in January, 1788. That mortgage and assignment, dated the 20th of May, 1788, were executed accordingly to Baker, his executors, administrators and assigns, for ninety-nine years, if Matthews should so long live, subject to redemption; with a covenant, that Matthews would keep the said sum of 2000*l.* insured for his life.

Baker having been afterwards paid by Shephard, Matthews gave Shephard a bond for 2000*l.*, dated the 25th of March, 1791, and by indentures of the same date the mortgage and the policy of insurance were assigned to Shephard. In January, 1792, Shephard borrowed from Hercy and Co., bankers, the sum of 2000*l.*; and on that occasion he deposited with them the indentures of the 20th of May, 1788, and the 25th of March, 1791, and the bond and the policy of insurance, and a note, under his hand, declaring that the said instruments were deposited as a security for that sum with interest. In March, 1794, Hercy and Co. calling for repayment, Shephard applied to Wallwyn and Co., bankers, to open an account with him; requesting them to lend him 2000*l.*, and proposing to deposit the deeds and securities then in the hands of Hercy and Co., as a security, and representing that it would be necessary to have part of such moneys for the purpose of redeeming them, before he could deliver them to Wallwyn and Co. They consented to open an account with him, and to advance or give him credit for the sum of 2000*l.* upon the proposed security and the farther security of his note. On the 21st of March, 1794, they advanced him the sum of 1000*l.* for the purpose of redeeming the se-

curities; and upon the 24th of March he deposited all the said securities with them, and gave them his promissory note at three months for 2000*l.* and interest, and he wrote a note declaring the purpose of the deposit. Afterwards, before the 24th of June, 1794, he drew upon them to the amount of 1431*l.* 9*s.* 4*d.* exclusive of the 1000*l.* originally advanced. They received upon his account only 600*l.*, and, upon the 24th of June, 1794, when his note became due, the balance due to Wallwyn and Co. was 1856*l.* 13*s.* 5*d.* In January, 1795, Shephard became a bankrupt. By indentures, dated the 29th of September, 1797, executed in pursuance of a decree made at the Rolls upon the 14th of June, 1797, upon a bill filed by Wallwyn and Co. in December, 1794, the assignees of Shephard assigned all the said securities to the plaintiffs in that cause. Matthews was made a defendant in that suit; but before the hearing the plaintiffs had the bill as against him dismissed with costs.

Shephard, as the attorney and solicitor of Matthews, was in the habit of receiving and paying large sums of money upon his account, and the premiums upon the policy of insurance were paid by him, and charged in account with Matthews. Upon the bankruptcy of Shephard, Wallwyn and Co. paid one premium upon that policy, which became due in January, 1795. By an account settled and signed by Matthews and Shephard upon the 11th of October, 1794, a balance of 4400*l.* appeared due to Shephard. Matthews had no notice of Shephard's transactions with Herey and Co. and Wallwyn and Co. as to the securities assigned to him by Matthews, till the bill was filed against him in December, 1794.

This bill was filed by Matthews against Wallwyn and Co. and against the assignees of Shephard, who was dead, praying that the assignees of Shephard may be decreed to come to a fair settlement of accounts depending between the plaintiff and Shephard; and that the plaintiff may be at liberty to redeem the mortgaged premises, if any thing shall appear to be due from him upon the settlement of accounts in respect of the said mortgage; and that the defendants Wallwyn and Co. may re-convey and re-assign to the plaintiff the mortgaged premises, and deliver up the said securities to be cancelled; and that they may be restrained by injunction from proceeding at law—the plaintiff offering to pay what, if any thing, shall appear to be due from him upon the aforesaid settlement of accounts on account of the said mortgage.

The bill charged that the plaintiff, having been informed by some of Shephard's friends that he was in an embarrassed situation, but that, if the plaintiff would give him a security for the balance then due to him, it would be of infinite service to him in enabling him to settle with his creditors, and the plaintiff being

willing to assist Shephard, and imagining himself to be more in debt to him than he really was, promised to do so, when the account should be properly made out and settled. In a few hours Shephard produced an account, and requested the plaintiff to sign it; and the plaintiff did sign it at his earnest solicitation, and upon his agreeing to permit the plaintiff to take it into the country for the purpose of examining it and making such alterations as should be proper. The plaintiff has since discovered that Shephard previous thereto had received for the plaintiff's use divers sums of money, for which he had not given the plaintiff credit in the account; and that if such sums together with several sums received by him since signing the account were deducted, a considerable balance would be due to the plaintiff; especially as he has also discovered that several sums, with which he was charged in the account as having been paid by Shephard, were not paid by him.

The defendants Wallwyn and Co., by their answer, submitted that Shephard being the plaintiff's attorney was sufficient notice to him, and that they are entitled to a specific lien upon the mortgaged premises and securities in respect of the sum of 185*l.* 13*s.* 5*d.*, the balance due to them from Shephard upon the 24th of June, 1794, whether the said sum of 2000*l.* was or was not due from the plaintiff to Shephard when the defendants advanced the said 2000*l.* upon the said securities, or whether the same was or was not afterwards satisfied or paid to Shephard by the plaintiff, or by reason of monies received by Shephard upon his account; and that they ought not to be restrained from proceeding by ejectment to recover possession.

The assignees of Shephard by their answer submitted to account.

The cause was heard upon bill and answer. When it was first opened, the Lord Chancellor directed it to stand over, that it might be formally argued; considering the point to be new, and of great importance, as it might affect the general credit of mortgages.

LORD CHANCELLOR [LOUGHBOROUGH]: In this cause the question was only whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the general question. Matthews had created a mortgage, upon which Shephard had advanced money; and, Shephard being his attorney, the purpose of creating the mortgage was that money might be raised for the use of Matthews. Shephard ought not to have made any use of the mortgage but for the purpose for which it was created, viz.,

to raise money for Matthews; but he thought fit to assign the mortgage without the privity of the mortgagor, and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

When the cause came on before me, a case was referred to in which, it was supposed, Lord Thurlow had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment; and that to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is that persons most conversant in conveyancing hold it extremely unfit and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assignments of mortgages are taken without calling upon the mortgagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured, and it is not in the course of transferring mortgages, but of raising money upon such securities; but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party and being satisfied that the money was really due.

With regard to the case that was quoted, I believe that from the circumstances of the first order that was made, there might have been some doubt expressed at the time upon the point. The bill was filed by Lunn and others, assignees of Lodge, a bankrupt, against St. John. According to the state of the case I have had, Lodge made a mortgage to Pitman, who, being indebted to St. John, made an assignment to him for a sum less in fact than the sum due upon the mortgage. It was stamped and signed, but not sealed. Lodge and Pitman both became bankrupts. The bill was filed, insisting that nothing was due upon the account between their estates. The defendant St. John insisted that the plaintiffs must redeem him, who was a fair mortgagee, and had nothing to do with the account. Lord Thurlow in the decree gave special directions to the Master to inquire what was due at the time of the

mortgage, what was due at the time of the assignment, and what remained due—saving the point, how far *St. John* would be affected, till after the report upon that special direction. It came on upon the report before the Lords Commissioners, the Master having reported that *Pitman* was indebted to *Lodge* in 7000*l*. By the order made upon that report it was declared that the assignments, dated the 13th of February, 1755, and May, 1776, made by *Pitman* to the defendants *St. John* and *Muilman* are to be deemed null and void against the estate of *Lodge*, the bankrupt, and are to be delivered up by the defendants *St. John* and *Muilman* to the plaintiff, the surviving assignee of *Lodge*, to be cancelled; that all deeds and writings relating to the estate of *Lodge* be delivered up upon oath; and that the defendants join in reconveying the estate. The final result therefore was that, nothing being due upon the original mortgage, the two assignees of it took no benefit by the assignments. Therefore that case is a direct authority in favor of *Matthews*.

The cases decided, and long decided, in *Precedents in Chancery* and *Vernon*, seem also to bear very much upon it; where it was made a question, now perfectly settled, that, as between the mortgagee and the persons claiming under him, without the privity of the mortgagor they cannot add to what is due, settle the account, or turn interest into principal. The mortgagee having been in possession, the assignee is bound to settle the account of the rents and profits received by the mortgagee, from whom he takes the assignment. Considering the general principles upon which this Court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a security for a debt; and the real transaction is an assignment of a debt from *A.* to *B.*—that debt collaterally secured by a charge upon a real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.

Therefore the plaintiff must be at liberty to redeem upon payment of what the Master shall find due upon the original mortgage from him to *Shepherd*. I will direct the account exactly in the same way as Lord *Thurlow* made the direction in the case I have

cited: an account of what was due at the time of the mortgage, what was due at the time of the assignment, and what remains due.¹

The account in that case was, I apprehend, changed by transactions subsequent to the mortgage; however, I do not know that.

PARKER v. CLARKE.

CHANCERY—THE ROLLS COURT, 1861.

(30 *Beav.* 54.)

William Gray Cruchley was, under the will of his father, entitled to a share of his real and personal estate.

By an indenture dated the 5th of July, 1849, William George Cruchley conveyed and assigned to Mr. Thomas all his estate and interest under the will for securing 95*l.* This mortgage was executed while William George Cruchley was in prison for debt, and the Court, after weighing the evidence, came to the conclusion that it was given without consideration and under a promise to release the mortgagor from prison, which was never performed.

On the 12th July, 1849, Thomas transferred this mortgage to the defendant Clarke, who had notice of the circumstances under which it had been obtained, and in July, 1860, Clarke deposited the mortgage and transfer with Phillips to secure the payment of moneys due and to become due. Phillips had no notice of the circumstances under which the mortgage had been obtained.

This bill was filed against Clarke and Phillips for a declaration that the mortgage deed was void, and for an order for its delivery up to be cancelled.

Mr. Follett and *Mr. Ellis*, for the plaintiff, contended that the deed was void, and that Phillips, having a mere equitable title to what might be due on the mortgage, could only claim such interest as Clarke was entitled to.

Mr. Bagshawe and *Mr. J. Napier Higgins*, for Clarke, contended

"It is settled that, if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee; and I think that rightly settled. I would not say so, but that I know Lord Kenyon entertained a doubt of Lord Rosslyn's decision upon that subject."—*Per* Lord Eldon in *Chambers v. Goldwin*, 9 Ves. 254, 264 (1804). The reference is to the decision of Lord Loughborough (subsequently created Lord Rosslyn) in the principal case.

that the evidence failed in shewing that no consideration had been given for the mortgage.

Mr. Lloyd and *Mr. Locock Webb*, for *Phillips*, argued that he was a purchaser for valuable consideration without notice, and that he was entitled to hold the deed until he had been paid what was due to him; that the mortgagor, having enabled *Clarke* to obtain money on the faith of this deed, could not set it aside without paying what had been actually advanced on it by *Phillips*.

The following authorities were cited in the course of the argument: *Powell on Mortgages*, Vol. 2, p. 589 (6th edit.); *Walley v. Walley*, 1 Vern. 484; *The Earl of Aldborough v. Frye*, West's Rep. 221; 7 Cl. & Fin. 436; *George v. Milbanke*, 9 Ves. 190. The cases of *Reynell v. Sprye*, 8 Hare, 222; 1 De G., M. & G. 660; and *Cockell v. Taylor*, 15 Beav. 103, were also referred to.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]:

I am of opinion in this case, that the deed must be delivered up. The first question to be considered is whether the deed is not void, being a mortgage deed for which no consideration was given, and having been obtained from a person in prison, under promises to release him, which were never realized.

This, I am of opinion, is the state of the case:—[His Honor here examined the evidence and proceeded:]—The result is that in my opinion it is proved that no consideration was given for the mortgage deed and, as against *Clarke*, it must be delivered up to be cancelled.

With respect to *Phillips*, I am of opinion he could only take what *Clarke* could give him, and that he cannot stand in a better situation than *Clarke* himself. *Phillips* must therefore deliver up the deeds, and his only remedy will be against *Clarke*.

WEBB v. COMMISSIONERS OF HERNE BAY.

COURT OF QUEEN'S BENCH, 1870.

(*L. R. 5 Q. B. 642.*)¹

An action commenced by writ, with an indorsement that the plaintiffs intended to claim a writ of mandamus to command the defendants to apply all the money raised or to be raised under or by virtue of 3 and 4 Wm. IV., c. 55, in the manner prescribed by

¹A short statement of facts is substituted for that given in the report.

s. 123 of that act. At the trial a verdict was taken for the plaintiffs, subject to a case.

The defendants are a body corporate, incorporated by the said act for the purpose of local improvement, and empowered by the act to levy rates and to borrow money at interest, mortgaging the rates and issuing debentures for that purpose. The form of the debentures was prescribed by the act, which also made them capable of assignment in the form provided. Further, the commissioners were declared incapable of taking or entering into any bargain or contract under the act, and a penalty was prescribed for so doing. In 1835 the defendants bought large quantities of bricks of David Halket, one of the commissioners, who was a brick and tile manufacturer, and in payment therefor issued to him certain mortgage securities of £100 each, in the form prescribed by the act, and which were duly registered. The mortgages were in the form of grants of the rates levied by the commissioners to David Halket, his executors, administrators and assigns. No money was actually paid by Halket to the commissioners. The mortgages so granted to him were duly transferred to the testator of the plaintiffs, who had no notice of the circumstances under which they were issued. No part of the principal or interest of the mortgage debt has ever been paid. Section 123 of the act above referred to authorizes the commissioners to apply the money to be raised by them in discharging such interest and principal.

The questions for the opinion of the Court were:—

1st. Whether the plaintiffs are entitled to recover in this action any and, if so, what sum as damages in respect of arrears of interest on the six mortgages or any of them.

2nd. Whether the plaintiffs are entitled to a writ of mandamus in the form endorsed on the writ.

COCKBURN, C. J. By 3 & 4 Wm. 4 c. cv. a local Act, which provided for the paving, cleansing, lighting, and improving the town of Herne Bay, certain commissioners are appointed: and by s. 119 the commissioners have power to mortgage the rates which they are empowered to levy under the Act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money raised or to be raised under the Act to the purposes of the Act. In order to construct certain buildings necessary for the purposes of the Act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question, and instead of being paid in cash he was paid by debentures.

tures. It is said that the transaction in respect of which the debentures were issued was illegal under s. 10 of the local Act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commissioners; and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction. It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in *indebitatus assumpsit* for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power under s. 119 only to borrow money, and it may be that under the power to borrow they were not authorized to give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures, in the form prescribed by the Act, which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. Under those circumstances, it is clear the principle laid down in *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Ex. 654, is immediately applicable to the present case, as well also as the doctrine laid down in the judgment of this Court in the case to which my Brother Blackburn referred,¹ *Re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 584. In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company were estopped by their own act from denying the right of the innocent transferees of the shares to be registered as shareholders. I think the principle of all those cases is strictly

¹Upon the argument, the report of which is omitted here.

applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited, they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defence cannot be made available.

I confess I cannot see any difficulty in the other points made, namely, that the first purpose to which moneys raised by the commissioners is to be applied is that of paying the costs and charges of getting the Act. It is true these expenses have been met partly by debentures which are still unpaid; but that is no answer to an application for payment on the part of the present holder of these debentures.

It was further contended that the mandamus claimed by the plaintiffs will not lie, because it is possible that rates may not hereafter be raised, and the form of the mandamus ought to have been to levy rates out of which to pay the interest on the debentures; but it appears that up to the present time rates have from time to time been levied, and if the rates be levied, inasmuch as the commissioners are bound under the Act to pay interest upon the debentures which they have issued, the mandamus will operate and compel payment of the amounts claimed in this action. If, owing to the form which this mandamus assumes, the commissioners desist from levying the rates, the consequence will be that a further mandamus will be required, commanding the commissioners to levy a rate for the express purpose of paying the interest; but I think we are fairly entitled to presume that that which has been done, and which is a part of the duty of the commissioners to do under the provisions of the Act, will continue to be done.

BLACKBURN, J. I am of the same opinion. The plaintiffs claim in the present action a writ of mandamus commanding the defendants to pay any money raised or to be raised under and by virtue of 3 & 4 Wm. 4 c. cv., in the manner prescribed by s. 123 of that Act. That is the duty they require the commissioners to fulfil.

stating that the plaintiffs are personally interested in the fulfilment of it. When we turn to s. 123 we find it requires the defendants to apply so much money as may be raised under the Act, in the first place in defraying its expenses, in the next place in paying the interest upon the bonds and debentures, and afterwards in paying for the works and purposes of the Act. The plaintiffs are personally interested in having the money applied as provided by the Act; and if the commissioners have departed from their duty of properly applying the money and causing the interest to be paid, the plaintiffs are entitled to a mandamus.

It is said that the commissioners will not raise any money in future; and if the plaintiffs had anticipated that, they might have come to the Court for a mandamus not only to command the commissioners to apply the money, but to levy rates to raise it; but I see no objection to granting a mandamus in the limited form in which it is asked for, though probably the plaintiffs may be entitled to demand another in a different form at some future time.

The next question is, are the plaintiffs personally interested in the fulfilment of the duty created by the statute; or, in other words, are they the holders of the six debentures in such a manner as to have the right to have them enforced against the defendants? By s. 119 the commissioners are authorized to borrow and take up at interest any sum of money upon the credit of the rates authorized to be raised under the Act, but so that there shall not be owing upon the securities at any one time more than 5000*l.*, and *toties quoties*, to pay off and renew the loans, and the form of mortgage is given in the Act. And that form commences with the statement on the face of it that the commissioners have borrowed a particular sum of money of a particular individual upon the credit of the rates. Section 120 provides the mode in which a person who has the mortgage may assign and transfer it; s. 121 enacts that there shall be no preference by reason of priority of the date of the mortgages. S. 122 requires that a book shall be provided in which copies of the mortgages, securities, and transfers shall be entered and registered, to be open to inspection; and then it enacts that, after such entry, every such transfer "shall entitle the person to whom the same shall be made, and his executors, administrators, and assigns to the benefit of the security thereby made or transferred." So that the effect of the statute is this, the commissioners may borrow money and give a form of mortgage which, on the face of it, states expressly that they have borrowed a particular sum of money; the mortgage may be transferred, and when it is entered in the register which they are bound to keep, the transferee shall have the benefit of that

security. The plaintiff's testator has *bonâ fide* taken a transfer of six mortgages, on the face of which it is expressly stated that the commissioners have borrowed from Halket (who is the person named in the mortgage) six sums of 100*l.* each. The commissioners knew from the Act that these mortgages when so granted might be transferred to a person on the faith of the matters stated in them. They knew from the Act that such transfer might be made and might be entered on the register, and, when registered, the security might be transferred. That being the state of things, the plaintiffs, who are the *bonâ fide* holders of the mortgages, demand the payment of the interest on the mortgages, and the commissioners deny their liability to pay on the ground that the matters stated on the face of the mortgages are incorrect and untrue. The law laid down in *Freeman v. Cooke*, 6 A. & E. 469, and *In re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 583, is very clear, that when a person has made a statement similar to the present, he is precluded as against another person who has *bonâ fide* acted upon it from denying the truth of the statement, and consequently I hold that the commissioners, who have stated on the face of the mortgages that Halket had advanced and lent the money on the credit and for the purposes of the commissioners, are precluded as against his *bonâ fide* transferees from denying the truth of that statement.

Our decision on this point disposes of the case. I do not think it necessary to enter into the other questions. One is that, inasmuch as the mortgages were given in payment of a debt for bricks sold, they could not have been given for money borrowed. My own impression is—and it is a very strong impression—that the legal effect of such a transaction is the same as if the commissioners had borrowed the cash and then applied it in payment of the debt for bricks; and as if the creditor had lent the money upon the security of the debenture, and then received back the identical coin in payment of his own debt for the bricks. I see no objection to this view of the transaction, which I incline to think valid.

A further objection was raised. It was founded on s. 10 of the local Act, which provides that where any commissioner is either directly or indirectly interested in any bargain or contract, he shall be disqualified, and further that no person during the time he shall be such commissioner shall be capable of taking or entering into any such bargain or contract, nor shall any commissioner act in any matter in which he shall be personally interested. And s. 11 imposes a penalty of 50*l.* upon every commissioner who acts being disqualified. It was contended that Halket, who had furnished the bricks to the commissioners, being himself a commissioner at

the time, the contract was illegal and void. It is not necessary to decide this question, and I wish to guard myself from being thought to give any judgment on that point.

MELLOR, J. I wish to rest my judgment in this case on the general doctrine of estoppel. I cannot distinguish it in principle from *In re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B. 583, which is founded on the very salutary decision of *Freeman v. Cooke*, 2 Ex. 654. The local Act contemplates the borrowing of the money for the purposes of the works of the town of Herne Bay, and it gives a form of mortgage upon which the money is to be borrowed. The form states that in consideration of the sum of money advanced and lent upon the credit of the rates for the purposes of the Act, and paid to the treasurer of the commissioners, they thereby grant and assign a due proportion of the rates. That was the form of the mortgage in this case. In addition to that the Act, which enables the commissioners to raise money upon mortgage in that form, also enables the holder to assign the mortgages. He may, by a writing under his hand, transfer the same to any person, and it gives the form of endorsement by which the transfer may be made. There is a provision for registering the transfer, and when that is completed any person who is an innocent holder has a complete title. The commissioners, who have borrowed the money and enabled the transfer of the mortgage to be effected, cannot afterwards deny their liability on the ground that the mortgage was given, not for money lent, but for some purpose which they allege to be illegal. On that ground I hold the plaintiffs are entitled to the remedy they seek.

LUSH, J. I also think it is unnecessary to express any opinion on the question whether, if this action had been brought by the original mortgagee, the commissioners could have set up any defence against the claim; because the defence, namely, his incapacity to contract at the time by reason of his filling the office of commissioner, cannot be set up against the plaintiffs, his transferees. The mortgage security itself makes the money payable to Halket or his assigns. The Act of Parliament says that any person entitled to any security may transfer it in the terms specified in the Act, and further that when that transfer has been made and registered in the book of the commissioners—and this has been registered—every such transfer shall entitle the person to whom the same shall be made to the benefit of the security thereby transferred. Now the effect of those sections, I think, is to make these mortgages negotiable securities and to attach to them the incidents of negotiable securities; one of which is that an innocent holder for value, as it is admitted the plaintiffs are, acquires a title of his own,

unaffected by any infirmity to which the title of his assignor might have been subject. Upon that ground, I think the plaintiffs are entitled to judgment.

Then as to the alleged defect in the prayer of the mandamus, I think it is quite enough to say that the complaint against the commissioners is not that they do not make rates, but that they apply the proceeds in a different way than that directed by the Act of Parliament. It is to be assumed they will go on making the rates as they have done. The mandamus is directed to the misappropriation. If it turns out to be needful to compel them to do what they have hitherto done—to make the rates—then a mandamus may be applied for for that purpose.

Judgment for the plaintiffs.

BICKERTON v. WALKER.

SUPREME COURT OF JUDICATURE---CHANCERY DIVISION, 1885.

(*L. R. 31 Ch. D. 151.*)

Elizabeth Goulston, who died in 1862, bequeathed to trustees a sum of £1000 upon trust to invest it and pay the income to Elizabeth Bickerton, the wife of John Bickerton, for life, and after her death upon trust for such children of hers as should be living at her decease, and being sons should attain twenty-one, or being daughters should attain that age or marry, and for such issue of any children dying in Mrs. Bickerton's lifetime as should be living at Mrs. Bickerton's death, such children to take their parent's share. The legacy was invested in £975 New £3 per Cent. Annuities.

In 1879 Mrs. Bickerton was a widow with three children, all of whom had attained twenty-one. Emily Bickerton, spinster (hereinafter called Miss Bickerton), was one of them.

On the 10th of February, 1879, Mrs. and Miss Bickerton executed a mortgage deed by which, in consideration of the sum of £250 therein expressed to be paid to them by Ebenezer Bates, "the receipt and payment of which said sum of £250 they, the said E. Bickerton and E. Bickerton the younger, do hereby acknowledge, and from the same and every part thereof do hereby release the said E. Bates, his executors, administrators, and assigns," they jointly and severally covenanted with Bates for the

payment to him of £250 with interest at £7 per cent. on the 10th of August then next. Mrs. Bickerton then assigned to Bates her life interest in the £975 stock and a policy of assurance for £100 effected by her on her own life, and Miss Bickerton assigned to Bates her reversionary share in the £975 stock and a policy of assurance for £300 effected by her on her own life, subject, as regards all the interests assigned, to redemption on payment of £250 with interest at £7 per cent. on the 10th of August then next. Indorsed on the deed was a receipt in the usual form, signed by Mrs. and Miss Bickerton, acknowledging the receipt of £250.

Astley acted as solicitor for both parties in this transaction, and the deed was left in his hands. On the 11th of March, 1879, the mortgage was transferred by Bates to Hunter, who acted by his own solicitor, Walker, and gave full value for the mortgage as a mortgage for £250, without making any inquiry from the mortgagors.

This action was commenced by Mrs. and Miss Bickerton against Walker, Bates, Astley, and Hunter, alleging that the plaintiffs had only received sums amounting to £91 17s. 6d. instead of £250, that Bates was the nominee and trustee of and for Walker, and that Bates and Astley acted under his directions, and that Hunter had notice of the above facts when he took his transfer. The plaintiffs asked that the mortgage might be cancelled, they offering to pay the sum really advanced and the interest thereon, and that the transfer might be declared void against the plaintiffs, or in the alternative that the mortgage might stand as a security for what had been really advanced and interest, and that the plaintiffs might have redemption on that footing, or as another alternative, that they might have redemption on the mortgage deed as it stood.

It was clearly shewn that Walker was not interested in the mortgage, and had simply acted as Hunter's solicitor, and no ground was shewn for affecting either of them with notice that the plaintiffs had not received the whole £250. Vice-Chancellor Bacon considered the plaintiff's case not to be proved, and gave a judgment dismissing the action with costs as against Walker, and dismissing it with costs as against Hunter, except so far as it sought the ordinary judgment for redemption. The usual order in a redemption suit was made against Hunter, with a direction that the account was to be taken on the footing of £250 having been advanced to the plaintiffs.

The plaintiffs appealed, and the appeal was heard on the 16th and 17th of November, 1885. The evidence as to the circumstances under which the mortgage was executed was gone into, and

in the opinion of the Court of Appeal was such as would, if there had been no transfer, have made it proper to decree redemption on payment only of what should be shewn to have been actually advanced. Astley was abroad and Bates did not appear, so the material question was whether a decree of that nature could be made against Hunter.

Seward Brice, for the appellants:—I contend that a mortgage can only be enforced by a transferee to the same extent as it might be enforced by the original mortgagee. (*Parker v. Clarke*, 30 Beav. 54.) The transferee takes subject to the equities which affect the original mortgagee. (*Norrish v. Marshall*, 5 Madd. 475.)

[FRY, L. J.:—That case only deals with subsequent transactions between the mortgagor and mortgagee, the mortgagor not knowing of the transfer.]

The principle is illustrated by *Matthews v. Wallwyn*, 4 Ves. 118, which decides that a transferee takes subject to the account between the mortgagor and mortgagee. The principal thing in the transaction is the assignment of the debt, as said by Lord Eldon in that case. The debt, until the recent change in the law, was only assignable in equity; the assignment is subject therefore to equitable principles, and passes nothing but what is justly due on the instrument. *Williams v. Sorrell*, 4 Ves. 389, follows the same principle. The true view is that the transferee is bound by all equities affecting the mortgage transaction, not merely by the state of the account. *Smith v. Parkes*, 16 Beav. 115, shews that the assignee of a debt takes subject to all equities.

[BOWEN, L. J.:—Are you not estopped by the deed and the receipt upon it from saying that the whole sum was not advanced? (*Goodwin v. Roberts*, 1 App. Cas. 476.)]

That was the case of a document which by custom is a negotiable instrument. The present is the case of a mortgage which is not given with a view of its passing from hand to hand.

[BOWEN, L. J., referred to *In re Agra and Masterman's Bank*, L. R. 2 Ch. 391.]

The present case is more like *In re Natal Investment Company*, L. R. 3 Ch. 355, in which the *Agra Bank Case* was referred to, and which is a strong authority in my favour. There is no estoppel from a recital in a security unless it is shewn that the recital is intended to be shewn to third parties to induce them to act upon it; and the fact that no prudent person takes a transfer of a mortgage without an inquiry from the mortgagor, shews that the recital is not intended to be acted on. (*Rolt v. White*, 31 Beav. 520, and *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294, support my contention. I say then that the mortgage ought to be cut

down as against Hunter. No prudent transferee of a mortgage ever takes his transfer without inquiring from the mortgagor, and it is negligence to do so. The case is quite different from that of an absolute sale, because there an inquiry would not be made of the original vendor unless there was something to raise suspicion.

Millar, Q. C., and Leving, for Walker and Hunter:—As against Walker there is no case: he ought never to have been made a party, and the dismissal as against him must stand. As regards Hunter, assuming that the whole £250 was not advanced, we say that he is not affected by that. If a person takes a transfer of a mortgage without inquiring from the mortgagor, he does so at his own risk as regards the state of the account, but the mortgagor is estopped from saying that any statement made by himself is untrue. The transferee has a right to act on any such statement. Everybody knows that the sum due on a mortgage may have been reduced by part payment, and if a transferee makes no inquiry from the mortgagor the mortgagor gets the benefit of previous part payments as against him. By saying that a less sum than the original principal is now due he is not contradicting anything in the mortgage deed, but here the mortgagor is alleging as against a *bonâ fide* purchaser without notice that the statement in the mortgage deed as to the sum advanced is not true. That cannot be allowed. *Hunter v. Walters*, L. R. 7 Ch. 75; *West v. Jones*, 1 Sim (N. S.) 205; *Rice v. Rice*, 2 Drew. 73. In *Shropshire Union Railways and Canal Company v. The Queen*, L. R. 7 H. L. 496, 509, Lord Cairns refers to *Rice v. Rice* with approbation. The principle is not confined to cases where A. makes a written representation to B. with the intention that it shall be shewn to C., for both Lord Cairns in the last-mentioned case, and Lord Hatherley in *Hunter v. Walters*, lay it down broadly that a receipt for money estops the party giving it, as between him and a third person who has acted on the faith of it.

[FRY, L. J.:—An assignment of a chose in action is subject to all equities. Do you say that the receipt is an assertion that there are no such equities?]

I say that at all events it makes the equities unequal; a person who has given a receipt stating that he has received money, and then disputes its truth, cannot have as good an equity as a person who acted on the faith of the receipt.

[BOWEN, L. J.:—What do you say to *In Re Natal Investment Company*, L. R. 3 Ch. 355?]

In that case there was no receipt, and no one buying a debenture in the market buys it on the faith of the whole of the money having been advanced, it being notorious that debentures are often

issued below par. In none of the cases cited against us was there any indorsed receipt. *White v. Wakefield*, 7 Sim. 401, is strong in our favour.

The judgment of the Court (Sir James Hannen, and Bowen and Fry, L. JJ.) was delivered by

Fry, L. J.:—In the year 1879 a sum of £975 New 3 per Cent. Annuities was standing in the name of a trustee under the will of a Mrs. Goulston, upon trust for the plaintiff, Mrs. Bickerton, for life, with remainder in equal shares to her children living at her death and the issue of children then deceased. She had three children, of whom the plaintiff, Miss Bickerton, is one.

By an indenture bearing date the 10th of February, 1879, the plaintiffs assigned to the defendant Bates their interests in these annuities to secure a sum of £250 and interest at 7 per cent. payable on the 10th of August, 1879. On this mortgage there was indorsed the usual receipt for the sum of £250, which was signed by both plaintiffs.

The plaintiffs allege that sums amounting to £91 17s. 6d., and no more, were paid to them in respect of the £250; and though the evidence adduced by the plaintiffs is far from satisfactory, we are of opinion that as against the defendant Bates the plaintiffs have established by evidence a case for reducing the mortgage; or, in other words, that as against Bates the plaintiffs would be entitled to a declaration of their right to redeem on payment of what should be found to have been actually advanced on the mortgage, with interest.

On the 11th of March, 1879, the defendant Bates assigned this mortgage security to the defendant Hunter, and it is not disputed by the plaintiffs but that this defendant has shewn that he paid the full consideration of £250 for the assignment, and that he took the assignment without actual notice of any equity subsisting between the plaintiffs and Bates except the equity of redemption according to the form of the mortgage deed.

The plaintiffs, however, contend that inasmuch as the assignment of their interests in the legacy was an assignment of a chose in action, the defendant Hunter is now liable to all the equities which the plaintiffs had at the date of the assignment against his assignor, Bates. This the defendant Hunter denies.

As the legal interest in the legacy was and is vested in the trustee of Mrs. Goulston's will, it is evident that the interests both of the plaintiffs and of the defendant Hunter are equitable interests only, and the real question for our decision is, what are the relative merits of these persons having adverse equitable interests? If the merits of the one are greater than those of the other, the

Court will give the priority to the greater merits: if and only if the merits are equal, it will give the priority of right to the one who is prior in point of time.

The plaintiffs executed a deed which recited that they had received the whole sum of £250, and which stipulated that their right of redemption should be on payment of the sum of £250 and interest, they signed a receipt on the back of the deed stating that they had in fact received this sum of £250, and they permitted Bates, or Astley, who was acting with or for him, to have possession of the deed containing these false statements. That the plaintiffs were in a moral point of view excusable for these acts is beyond doubt, and that they were deceived by those whom they trusted, and as such are objects of sympathy, is equally clear. But they were inexact and careless, and placed in the hands of Bates or Astley the means of deceiving other persons, and these are in the view of a Court of Equity demerits.

Was Hunter guilty of negligence or want of care in his part of the transaction? He must, on the evidence before us, be taken to have advanced his money on the faith of the production of the mortgage deed and receipt signed by the plaintiffs: and if the assignment by the plaintiffs had been, not a mortgage but an absolute conveyance, it would, we think, have been clear that there would have been no negligence whatever on the part of the defendant Hunter in not inquiring of the plaintiffs as to their rights or claims. But it has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that in the ordinary course of business a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all moneys received by his assignor before he has given notice of the assignment to the mortgagor. But in the present case the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assign is willing to take the risk of any payment having been made after the date of the mortgage he is not guilty of carelessness or negligence if, in the absence of any circumstances to

arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor.

The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand.

Our decision follows, as will be obvious to those who are familiar with this branch of law, the general lines laid down by Kindersley, V. C., in *Rice v. Rice*, 2 Drew. 73. For the solution of the particular question which distinguishes this case from that, viz., whether there is for this purpose any difference between a mortgage and an absolute conveyance, we have not been aided by any authority cited to us at the bar.

For the reasons already given we dismiss this appeal with costs.

OLDS v. CUMMINGS.

SUPREME COURT OF ILLINOIS, 1863.

(31 Ill. 188.)

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. M. E. Hollister, Judge, presiding.

This was a bill in chancery exhibited in the Circuit Court by Justin H. Olds against Preston Cummings, Cynthia Cummings, his wife, and others, asking the foreclosure of a mortgage.

It appears that on the 21st of November, 1857, Preston Cum-

mings executed to the order of Charles L. Kelsey his two certain promissory notes, both payable some months thereafter. On the same day on which the notes were executed, Preston Cummings, with his wife, Cynthia Cummings, to secure the payment of these notes, executed and delivered to Kelsey a mortgage upon real estate. The notes were assigned to Olds, the complainant, by Kelsey, the payee, as the bill alleges, before their maturity. Olds, the assignee sought by this bill to foreclose the mortgage mentioned. Cummings, in his answer, admits the execution of the notes and mortgage described in the bill, but interposes the defense of usury. It is also alleged in the answer, that the assignment of the notes by Kelsey to Olds was made (if at all) long after their maturity; but that, in fact, the matter of the assignment was only colorable, not made *bona fide* for a valuable consideration, and only to prevent the defendants setting up the defense before mentioned.

The record contains voluminous proofs upon these contested questions of fact; but it is not important to consider the evidence, as the point determined arises out of the facts as insisted upon by the complainant himself.

The Circuit Court held that the equity of the case was with the defendant, Preston Cummings, and that there was usury in the notes sued upon, of which usury the complainant had notice, and that he was not entitled to recover the same, but only the principal and interest in the notes, after deducting the usury which they contained: and a decree was rendered accordingly. Olds, the complainant below, then sued out this writ of error, and questions the correctness of that decree, because, among other grounds, the Circuit Court sustained the defense of usury as against him.

MR. CHIEF JUSTICE CATON delivered the opinion of the court: We do not find it necessary to determine the question whether Olds was a *bona fide* purchaser of this mortgage or not. In a case submitted subsequent to this one we have been called upon to examine the question as to how far the rights of the assignee of a mortgage, purchased for a valuable consideration before due, and in ignorance of any equities or defense, shall be affected by such defense; and, as this record also presents the question, and as the conclusion at which we have arrived decides the case, we shall here consider this question and none other.

By the common law choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes and bills of exchange. We have a statute, also, making certain choses in action assignable, prescribing a particular mode in which they shall be assigned. Our

statute provides that any promissory note, bond, bill, or other instrument in writing, whereby one person promises to pay to another any sum of money or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon. Now, the mortgage, to foreclose which this bill was filed, was given to secure the payment of two promissory notes which were assigned by the payee and mortgagee to the complainants. This was, in equity, an assignment of the mortgage. The notes were assignable by the statute, but the mortgage is not, nor is it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises to the assignee by deed; and upon the question whether this can be done, the authorities are conflicting. Even our statute, authorizing foreclosures of mortgages by *scire facias*, has carefully confined the right to the mortgagee, and does not authorize this to be done by assignees. But it is said that the assignment of the notes carries with it the mortgage, which is but an incident to the principal debt. That is true in equity, and only in equity. Courts of equity will not be confined to legal forms and legal titles, but look beyond these to the substantial, equitable rights of parties, and allow parties who have equitable rights to enforce those rights in their own names, without regard to legal titles. The assignee of a judgment, even, may, in his own name, enforce it in equity. But while courts of equity thus enforce equitable rights, they do it with a scrupulous regard to the equitable rights of others. Thus, if the assignee of a judgment attempt to enforce it in equity, no matter how much he paid for it, or how ignorant he might have been that it had been paid, or that there was other reason why it should not be collected, the court of equity will look into all the circumstances, and will not enforce it in his favor, if it ought not to be enforced in the hands of the assignor. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor; and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself.

We have not met with a single case where remedy has been sought in a court of chancery, upon a mortgage, by an assignee, in which every defense has not been allowed which the mortgagor or his representatives could have made against the mortgagee himself, unless there has been an express statute authorizing the assignment of the mortgage itself. There are many cases in which the assignees have been protected against latent equities of third per-

sons, whose rights, or even names, do not appear on the face of the mortgage. And the reason is, that it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid; but he should not be required to inquire of the whole world, to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as, for instance, a *c'estui que trust*.

We shall refer to a few of the many cases to be met with on this subject. In *Murray v. Lyburn*, 2 J. C. R. 441, the question arose upon a bill to foreclose a mortgage by the assignee, and Chancellor Kent said: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor, and not an equity residing in some third person, against the assignor." And for this distinction he assigns the reason above stated. Again, he says, in the same case: "But bonds and mortgages are not the subjects of ordinary commerce." Here is expressed the very essence of the reason of the law. Mortgages are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions, as notes, bills and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as the security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced; while he may take the mere promise to pay the money, as commercial paper, and depend upon the personal security of the parties to it. It may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said to be the life of commerce, which requires commercial instruments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper; and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident, to ascertain the amount due on the mortgage, then the courts of equity, to which resort is had, must pause, and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced. He who holds a note, and also a mortgage, holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and, as such, may be enforced in the

courts of law, with all the rights incident to such paper; and the other, the mortgage, with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity.

In *Westfall v. Jones*, 23 Barb. 10, the Court said: "Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title? It is a well-settled principle that the assignee of a chose in action takes it subject to all the equities which existed against it in the hands of the assignor." In this case the defense to the foreclosure was that the mortgage was given without consideration, and to defraud creditors, and the Court refused to enforce it, but left the assignee, as it would have left the mortgagee, where their contract left them. The case thus decides that the term *equities*, as here used, means *defenses*. The opinion of the Court proceeds: "But I am prepared to hold that the plaintiff has no other or greater rights in relation to this bond and mortgage, and stands in no better position, than Parsons, the mortgagee."

So, in Pennsylvania the same rule was held. In *Mott v. Clark*, 9 State R. 399, the Court said: "He (the assignee) takes it (the mortgage) subject to all the equities of the mortgagor, but not to the latent equities of a third person;" holding the same rule precisely as the case first referred to, as decided by Chancellor Kent; and such also was the case of *Prior v. Wood*, 31 Pa. State R., where the Court protected the assignee of the mortgagee against the latent equities of third persons against the assignor. And this is as far as any Court has gone in the protection of a *bona fide* assignee of a mortgage, when the proceeding was on the mortgage itself, and in the absence of any express statutory provision authorizing the assignment of the mortgage.

We find the law to be, both upon principle and authority, that the assignee of the mortgage in this case took it subject to the defense which the mortgagor had against it in the hands of the assignor. Of the sufficiency of that defense, to the extent admitted by the Circuit Court, no question was made.

The decree must be affirmed.

BAILY v. SMITH.

SUPREME COURT OF OHIO, 1863.

(14 *Oh. St.* 396.)

Error to the District Court of Lorain county.

The case is stated in the opinion of the court.

RANNEY, J. On the 8th day of October, 1853, the plaintiff gave to the defendant, Charles H. Bolles, his negotiable promissory note for the sum of \$5370, and payable two years after date, with interest. Prior to the 14th of December, in the same year, sundry payments had been made and indorsed thereon, leaving then due the sum of \$2500; and on that day the plaintiff executed and delivered a mortgage upon real estate situated in Lorain county to secure this balance. On the 9th of June, 1856, he filed his amended petition against Bolles, the original payee of the note, Kendall and Lucas, through whose hands the note and mortgage had passed by assignment, and Smith, the then holder, to compel the delivery and cancellation of these instruments; alleging that the note was given for a pretended patent right for a machine which was utterly worthless, whether patented or not; that both the note and mortgage were obtained by fraud, and that every subsequent holder thereof took them with full notice of the fraud and want of consideration.

Smith alone answered the petition, and claimed to have purchased the note and mortgage from Lucas shortly before they fell due, without notice of any fraud or want of consideration, and to be a *bona fide* holder thereof for value, and entitled to be protected as such.

No bill of exceptions embodying the evidence having been taken upon the trial in the court below, we have only to consider whether the facts found by the court justified the judgment which was rendered. If any state of the evidence, consistent with the pleadings, would justify the findings of fact which the court made, we are bound to presume, in support of the judgment, that such evidence was given. (*Id. v. Churchill, ante*, p. 372.)

The plaintiff obtained the relief demanded in his petition for everything beyond the amount paid by Smith for the note and mortgage, with interest thereon, and for that amount an affirmative judgment for the sale of the mortgaged premises was rendered in favor of Smith, and the plaintiff was ordered to pay the costs of the action.

This judgment was founded upon a finding by the court that

the note was obtained by fraud, and without consideration, of which the intermediate parties, Kendall and Lucas, had notice, and that, as against them and Bolles, the plaintiff was entitled to the relief prayed for in his petition; but the court further find that Smith purchased the note and mortgage from Lucas in September, 1855, and paid therefor \$1250, without knowledge of the fraud and want of consideration existing between the original parties, and is entitled to hold the mortgage for the sum so paid with interest, and to recover thereon for that amount. Passing by, without any remark, the objection that this affirmative judgment in favor of Smith could not have been rendered without a distinct counterclaim interposed by him, and coming at once to the merits of the controversy, it is evident that the judgment can only be supported upon the establishment of the two propositions: first, that upon the facts found by the court, taken in connection with his answer asserting his title, the defendant, Smith, in the sense of the commercial rule, was a *bona fide* holder of the note, without notice of the equities existing between the original parties; and, second, that the immunity belonging to the note in the hands of such a holder, in virtue of this rule, is extended to the mortgage by which it was originally secured, and equally entitles the holder to recover upon that.

A sum of money due upon the note, from Baily to Smith, is an indispensable predicate upon which to found a judgment upon the mortgage; and as no personal judgment was rendered or attempted, and as both note and mortgage, until they came to the hands of Smith, are found to have been fraudulent and void, it is equally evident that he can sustain his judgment only upon the assumption that the attributes of negotiability belonged to the mortgage as well as the note, and if this can not be done, that the finding upon the note falls with the judgment rendered upon the mortgage. Without such finding, there can be no such judgment; and with the finding, there still can be no judgment, if Smith only succeeded to the rights of his assignor in the mortgage.

[The learned judge here considers at length the objections urged by plaintiff's counsel, in opposition to the finding of the court below that Smith was a *bonâ fide* holder of the note and mortgage for value, and comes to the conclusion that there was no error in the finding.]

The remaining question is one of much importance, and for the first time presented in this court. As it was supposed to be involved in other cases upon our docket, we have given opportunity to counsel in those cases to be heard, and after full argument, we have bestowed upon it very careful attention. Does the fact that a

note, obtained by fraud, has passed into the hands of a *bona fide* indorsee, entitle him to enforce a mortgage given to the original holder to secure its payment? Or may the mortgagor still insist upon the fraud, as a defense to an action brought to foreclose it? On the one hand, the question is in no way affected by the further question whether a mortgagee acquires such an interest in the land as to enable his grantee, being also assignee of the note, by deed duly executed, to claim the benefit of the rule which protects *bona fide* purchasers of real estate—there being no claim that any such deed was made? And on the other, we assume, as undoubted, that, whether a written assignment was made or not, the assignee of the note acquired all the rights and interests of the assignor in the mortgage. Very little aid is to be derived, either from adjudged cases or the elementary books, in the solution of the precise question now before us. This is not because the purchase and assignment of mortgages is a new thing. On the contrary, scarcely any business transaction has been more common and familiar, or has oftener engaged the attention of the courts. Nor has the nature of this instrument, and the rights of parties growing out of its assignment, either alone or in connection with a non-negotiable security, escaped attention, or failed to receive very full and accurate illustration. In such case, the universally acknowledged doctrine from the case of *Davies v. Austen*, 1 Ves. 247, to *Bush v. Lathrop*, 22 New York R. 535, has been, that it is to be regarded as a chose in action, and, as expressed by Lord Thurlow, “the purchaser must abide by the case of the person from whom he buys;” but during all that long period, neither in England nor in any of the old states of the Union, does the question seem to have been presented, whether it might not have a different effect upon its assignment when made to secure a negotiable instrument. This may be accounted for, in part, undoubtedly by the general practice of taking a non-negotiable bond with a mortgage; but it can not be doubted that mortgages have many times been taken to secure negotiable bills and notes, fraudulently transferred, and if such a distinction was thought to exist, it seems very singular that the holders should never have made the attempt to avail themselves of such securities. In New York the attempt has been frequently made to confine the principle that the purchaser must abide by the case of the seller, to the original debtor, allowing him to make the same defense against the assignee that he could against the assignor, but protecting the assignee without notice from what have been denominated latent equities, or interests in third persons, not in the apparent chain of title. And this for the very plausible reason that one proposing to purchase such an instrument might in-

quire of the debtor whether he pretended to any defense, and make his answer estop him from afterward asserting any, but that no amount of diligence would enable him to protect himself from such latent equities. But, after some vacillation in judicial opinion, the Court of Appeals, in *Bush v. Lathrop*, repudiated the distinction, and held that the purchaser in such cases must rely upon the good faith of the seller, that he could "take only such title as the seller had and no other," and that if mortgages were "to be further assimilated to commercial paper, the legislature must so provide."

But the direct question arising upon mortgages given to secure negotiable paper has arisen in two of the new states of the west, whose courts are entitled to high respect for their learning and ability, and it has there been held that the quality of negotiability is so far imparted to such mortgages as to make them available in the hands of a *bona fide* indorser of the paper, without any regard to the equitable rights of the original parties. (*Reeves v. Scully*, Walker's Ch. Rep. 248; *Dutton v. Ives*, 5 Michigan Rep. 515; *Fisher v. Otis*, 3 Chand. Rep. 83; *Martineau v. McCollum*, 4 *Id.* 153; *Croft v. Bunster*, 9 Wisconsin Rep. 503.) In the first of these cases, decided by the Chancellor of Michigan in 1843, no reasons are assigned or authorities cited; and in *Dutton v. Ives*, decided by the Supreme Court in 1858, the doctrine is again advanced upon the authority of *Reeves v. Scully*, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that state (*Fisher v. Otis*), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The court say: "This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper;" and Powell on Mortgages, 908, and note are cited. Mr. Powell certainly did suggest the question whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: "When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest whether, in such a case, the rule as to the mortgagee's liability would apply." The rule here referred to is that announced by Lord Loughborough in the leading case of *Matthews v. Wallwyn*, 4 Ves. 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now, it may be fairly assumed that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had

then no authority to base it upon, that neither the judicial records of England, nor in any of the old States, furnish any evidence that it has ever been adopted, and that it was first acted upon, nearly half a century after the suggestion was made, by a new State upon another continent. Under such circumstances, it can not be reasonably claimed that we are at liberty to regard it as an established principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so are well stated in the case of *Croft v. Bunster*, 9 Wis. Rep. 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee, is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. To which may be added the consideration pressed upon our attention in argument, that, if a recovery may be had for the debt, the mortgagor can have no interest in withdrawing the mortgaged property from liability to satisfy it. This last position is easily disposed of. If it were true, it would furnish no authority for changing the legal character and incidents of the mortgage deed, and it is evident that other lien-holders would often have a deep interest in the question. But it is not true as to the mortgagor. The right to dispose of property at the will of the owner, and to pay honest debts instead of those tainted with fraud, are valuable privileges, of which he should not be deprived without a necessity exists; and a decree upon the mortgage would very often deprive him of the benefits of the homestead law, which could not be effected by a judgment upon the fraudulent note. It is very evident also that the wife of the mortgagor, in a large majority of cases, might have a deep interest in the solution of this question. Wholly incapable of becoming a party to any commercial contract whatever, she may nevertheless convey her estate, or release her dower, by way of mortgage for the security of her husband's negotiable paper. If the mortgage is to be deemed negotiable in the hands of an assignee of the paper, we see no escape from the conclusion that the mortgage must be enforced against her, however gross and palpable the fraud may be by which it was obtained.

In a general sense, it may be very well and very correct to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the

debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage; and is incidental to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies, according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition; but in the view of a court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt, evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly enure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note it may be enforced, although obtained by fraud? This question has been repeatedly answered, in respect to a class of collateral agreements, much more intimately connected with the negotiable instrument than is the mortgage deed. We refer to guarantees indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated in every respect as such. (*Lamorieux v. Hewit*, 5 Wend. 307; *McLaren v. Watson's Executors*, 26 Wend. 425; *Miller v. Gaston*, 2 Hill, 188.) In the first of these cases Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note;" and Bronson, J., in the last, in support of the same position, says: "But the guarantee itself is not a negotiable instrument, and can not be transferred to a third person so as to give him a legal title to proceed in his own name against the guarantor. As in the case of other contracts which are not in their own nature assignable, the remedy upon a guarantee is confined to the original parties to the instrument." We have said that these instruments are much more

intimately connected with the note than is a mortgage deed. This will be apparent when it is remembered that the one ordinarily guarantees the particular instrument specified in it, and does not survive a renewal or other change of the evidence of indebtedness; while the other secures the debt, whatever changes may intervene, until it is paid; and, even a positive statutory bar which precludes a recovery upon the note, it has been held, does not prevent the enforcement of the mortgage. (*Fisher v. Massman*, 11 Ohio St. Rep. 42.)

In order to sustain the judgment rendered in this case, it is indispensably necessary to affirm—either that the mortgage, when made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable instrument or that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it, and within, one of the most important incidents of negotiability, a collateral contract having relation to the same debt. A very careful consideration of the whole subject has convinced us that we have no power to do either, and that neither justice nor public policy would be promoted by making the attempt. It certainly has never been thought to be within the province of a court to determine what instruments should be taken from the list of mere choses in action, and clothed with the attributes of negotiability. Bills, foreign and inland, assumed this position upon the immemorial custom of merchants, and were adopted into the law upon the reasons which avail to make up the great body of the common law. But the statute, third and fourth Anne, was found necessary to place promissory notes upon the same footing; and from that day to this, neither in England nor in this country has an instrument been added without express legislative sanction. Indeed, this could not well be otherwise. The necessities of commerce, and the instruments best calculated to answer its purposes, must all be considered before any intelligent decision could be made. These are legislative functions, requiring experience and extensive information, and calling for the exercise of a discretion wholly incompatible with the fixed certainty of judicial decision. But if it were otherwise, and the discretion rested with us, we could not introduce the mortgage deed into the list of negotiable instruments without disregarding the very foundation principles upon which such paper has always been supposed to rest. From the case of *Miller v. Race*, 1 Burr. R. 452, to the very latest case in our own reports, the language of the courts has been uniform, that such paper is only allowed in the interests of commerce, and “possessing some of the attributes of

money," to answer the purposes of currency. Lord Mansfield, in answer to the "ingenious" argument of Sir Richard Lloyd that the plaintiff could take nothing by assignment from a thief who had stolen paper, said the fallacy of the argument consisted in comparing bank notes to what they did not resemble. "They are not goods," he said, "not securities, nor documents for debt nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind;" "the course of trade creates a property in the assignee or bearer," and they can not be recovered "after they have been paid away in currency, in the usual course of business." This was said, it is true, of bank notes; but the same principles, and for the same reasons, were afterward applied by the same learned judge to every description of negotiable paper, and the case of *Miller v. Race* is still the leading authority upon this branch of commercial law.

Now, mortgages are not necessities of commerce; they have none of the "attributes of money," they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are "securities," or "documents for debts," used for the purposes of investment, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition and title of the property upon which they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense, before a court will foreclose his right to defend against those which have been obtained by force or fraud.

Against any amount of mere theory advanced to sustain the position that commerce requires these instruments to be invested with negotiable qualities, may be successfully opposed the stubborn fact, that in the first commercial country of the world, as well as in the great commercial states of the American Union, they have never been used for such purposes, or heard of in such a connection. It is quite immaterial whether this has arisen from the cause supposed—that they are never made to secure negotiable paper—or not; since it equally shows that no necessity for their use has ever been felt. A long experience has demonstrated that they are not necessary instruments of active trade and business; and we but follow in the footsteps of the ablest and wisest judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied—that of mere choses in action; and whether standing alone or taken to secure negotiable or non-negotiable paper, they are only available for what

was honestly due from the mortgagor to the mortgagee. If they are assigned, either expressly or by legal implication, the assignee takes only the interest which his assignor had in the instrument—acquires but an equity, and, upon the long-established doctrine in courts of equity, is bound to submit to the assertion of the prior equitable rights of third persons. To hold otherwise is to engraft legal incidents upon a mere equitable title; to give to the transfer of negotiable paper an effect beyond what it imports, or is necessary in the accomplishment of its legitimate purposes; and, finally, to invest with negotiable qualities a class of instruments, neither used for nor adapted to the trade and commerce of the country, and thereby to deprive the mortgagor of the just right of defending against fraud, without subserving any public policy whatever.

These views necessarily lead to the conclusion that, upon the facts found in the court below, the plaintiff was entitled to have his title cleared from the incumbrance of this fraudulent mortgage, and that the court erred in giving the affirmative judgment of foreclosure in favor of Smith. For this error that judgment is reversed, and the cause remanded for further proceedings.

PECK, C. J., and BRINCKERHOFF, SCOTT and WILDER, J.J., concurred.¹

CARPENTER v. LONGAN.

SUPREME COURT OF THE UNITED STATES, 1872.

(16 Wall. 271.)

Appeal from the Supreme Court of Colorado Territory.

MR. JUSTICE SWAYNE stated the case, and delivered the opinion of the court.—On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of \$980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect. On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable

¹*Johnson v. Carpenter*, 7 Minn. 176 (1862); *Bouligny v. Fortier*, 17 La. Ann. 121 (1865), accord. And see *Jones v. Dulick*, 55 Pac. Rep. 522 (Kan. 1898).

consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the District Court of Jefferson County, Colorado Territory, to foreclose the mortgage.

She answered and alleged that when she executed the mortgage to Jacob B. Carpenter she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage, he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver, that they sold, and received payment for a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the facts relating to the subject. The District Court decreed in favor of the appellant for the full amount of the note and interest. The Supreme Court of the Territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal.

It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is, whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. (Powell on Mortgages, 908; 1 Hilliard on Mortgages, 572; Coote on Mortgages, 304; *Reeves v. Scully*, Walker's Chancery, 248; *Fisher v. Otis*, 3 Chandler, 83; *Martineau v. McCollum*, 4 *Id.* 153; *Bloomer v. Henderson*, 8 Mich. 395; *Potts v.*

Blackwell, 4 Jones, 58; *Cicotte v. Gagnier*, 2 Mich. 381; *Pierce v. Faunce*, 47 Maine, 507; *Palmer v. Yates*, 3 Sandford, 137; *Taylor v. Page*, 6 Allen, 86; *Craft v. Bunster*, 9 Wis. 503; *Cornell v. Hitchcus*, 11 *Id.* 353.) The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defences to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defence against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser rather than a stranger." (*Hern v. Nichols*, 1 Salkeld, 289.)

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find that less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra*, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems, in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law, which a court of equity ought not to take from him, but to allow him the benefit of on the account."

A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another.

The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied, the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. (*Jackson v. Blodget*, 5 Cowen. 205; *Jackson v. Willard*, 4 Johnson, 43.)

It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration. In *Baily v. Smith et al.*, 14 Ohio State, 396—a case marked by great ability and fulness of research—the Supreme Court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes negotiable are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers.

The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien.

All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*

In *Pierce v. Faunce*, 47 Maine, 513, the court say: "A mortgage

is *pro tanto* a purchase, and a *bonâ fide* mortgagee is equally entitled to protection as a *bonâ fide* grantee. So the assignee of a mortgage is on the same footing with the *bonâ fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects."

Matthews v. Wallwyn, 4 Vesey, 126, is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The Lord Chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment. We think the doctrine we have laid down is sustained by reason, principle, and the greater weight of authority.

Decree reversed.

PAIGE v. CHAPMAN.

SUPREME COURT OF NEW HAMPSHIRE, 1878.

(58 N. H. 333.)

WRIT OF ENTRY, on a mortgage made to secure the defendant's note, endorsed and delivered with the mortgage, by the payee, to the

plaintiff, before maturity, as collateral security. The plaintiff received the note and mortgage in good faith in the ordinary course of business, and with no notice of any equities between the mortgagee and the defendant. The question whether the defence of want of consideration, and that the note and mortgage were obtained from the mortgagor by fraudulent representations, can be made, is reserved.

ALLEN, J. Negotiable paper, received for value, before maturity, in the ordinary course of business, without notice of infirmity, is, in the hands of a purchaser, freed from defences by the maker. The same is true when the paper is received and held as collateral security. (*Tucker v. Savings Bank*, ante, 83.) A mortgage is incident to the debt secured by it, and a transfer of the note or other evidence of debt carries the mortgage with it. (*Wheeler v. Emerson*, 45 N. H. 527.) Any defences, open to the maker in a suit on the note, may be made use of in an action on the mortgage. (*Northy v. Northy*, 45 N. H. 141.) The mortgage follows the debt as a shadow does its object, and cannot exist without it. Whoever holds the evidence of debt holds the mortgage security, and payment of the debt extinguishes the mortgage. The debt is the principal thing, and imparts its character to the mortgage, and the legal rights and remedies upon the debt become fixed upon its incident, the mortgage. Defences which cannot be made against the note, because it has travelled away from them, cannot be made against the mortgage which has kept company with the note. The freedom from infirmity, which the innocent purchaser and holder of the note enjoys, cannot be destroyed or made less by taking with the note a mortgage made and intended as security. The plaintiff received the note and mortgage in good faith, before the debt had matured, and with no notice of defect or defence. The defence sought to be set up cannot be made. (*Carpenter v. Lonaan*, 16 Wall. 271.; *Taylor v. Page*, 6 Allen, 86; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 1 Hun (N. Y.) 566; *Jones on Mort.* 834, 835, 840.)¹

Case discharged.

BINGHAM, J., did not sit.

¹*Fisher v. Otis*, 3 Chand. (Mich.) 83 (1850), *Dutton v. Ives*, 5 Mich. 515 (1858), *Croft v. Bunster*, 9 Wis. 503 (1859), *Gould v. Marsh*, 1 Hun. (N. Y.) 566 (1874), *Duncan v. Louisville*, 13 Bush (Ky.) 378 (1877), *Bassett v. Daniels*, 136 Mass. 547 (1884), accord. But see *Franklin v. Trogood*, 18 Iowa, 515 (1865).

TRUSTEES OF UNION COLLEGE v. WHEELER.

COMMISSION OF APPEALS OF NEW YORK, 1874.

(61 N. Y. 88.)¹

APPEAL from so much of the judgment of the General Term of the Supreme Court, in the fourth judicial department, as affirms in part a judgment dismissing the plaintiff's complaint, entered on the report of the referee. (Reported below 5 Lans. 160; 59 Barb. 385.)

This action was brought to foreclose a mortgage executed by Philo Stevens to Benjamin Nott, to secure the payment of \$2,800. It bears date July 18th, 1833, and was recorded August 8th, 1833. It covered, when given, four pieces of land, viz.: three in the then village of Oswego and a large tract in the town Scriba. The mortgage was assigned by Nott to the plaintiff by an assignment bearing date the 1st day of July, 1834, which was recorded on the 25th day of December, 1852.

The complaint, after stating the above facts, further states that a portion of the mortgaged premises, being two of the parcels of land in Oswego, had been released from the lien of the mortgage, and as to them the plaintiff made no claim, but alleged that the residue remained subject thereto.

Several of the defendants answered and set up that they were owners of different portions of the lands lying in Scriba, which they claimed were not subject to the lien of the plaintiff's mortgage, having been discharged by the transactions referred to in the opinions. The issues were referred to a referee, who dismissed the plaintiff's complaint.

The General Term on appeal reversed the judgment, so far as it related to most of the mortgaged premises, but affirmed it as to the residue. The further facts are set forth at length in the opinions.

DWIGHT, C. The facts of this case show that on October 1st, 1828, one Mellen conveyed a large tract of land, including the premises in question, to Chauncey B. Aspinwall. The consideration for the land was paid by Aspinwall, Philo Stevens and Benjamin Nott, in equal portions, and each were equally interested in the property.

Aspinwall, by deed bearing date January 26, 1830, conveyed an undivided two-thirds part of the property to Stevens, for the consideration of \$2,000. While Aspinwall held the property he executed contracts of sale of portions of the land to a number of

The report of this case is much abbreviated, the opinion of Lott, Ch.C., and considerable portions of the opinions of Dwight, C., being omitted.

distinct purchasers, in his own name, for the benefit of himself and Stevens and Nott, to whom he accounted from time to time for the proceeds of sales. After the conveyance to Stevens sales were made of other portions, the contracts being executed by Aspinwall and Stevens, and the proceeds being accounted for to Nott, as before.

While matters stood in this condition, Nott, by a quit-claim deed dated July 18, 1833, in consideration of one dollar, conveyed to Stevens all the lands described in the deed from Mellen to Aspinwall, and also village lots in Oswego, of which two-thirds belonged to Nott and one-third to Stevens. Stevens, by mortgage bearing date the same day with the last mentioned deed, mortgaged to Nott the property conveyed to Aspinwall by Mellen, whether under contract or not, and also the village property above referred to, to secure the payment of \$2,800, with interest semi-annually. The mortgage was payable in five years from date, was accompanied by Stevens' bond, and duly recorded August 8, 1833.

The bond and mortgage were assigned to the plaintiff July 1, 1834, for the sum of \$2,790.87, which was then paid to Nott. The execution of the assignment was proved by a subscribing witness, December 17, 1853, and the assignment recorded on the twentieth of the same month and year. While the mortgage, in form, covered the entire property sold to Aspinwall, yet it was conceded, on the trial, that some portions of it had been actually conveyed before the execution of the mortgage, and to this no claim was made by the plaintiff.

It will be observed, from the facts already detailed, that upward of nineteen years elapsed between the execution of the assignment and its record. Within this period, on March 28, 1836, Nott, still assuming to be the owner of the mortgage, released to Stevens some of the village lots embraced in the mortgage, who conveyed them to purchasers about the time that the releases were executed. It appeared that the lots so released were more than sufficient in value, at that time, to pay the mortgage. The purchasers under Stevens had no notice of the assignment to the plaintiff.

There is still due and unpaid on the mortgage the principal sum of \$2,800, with interest from January 1st, 1864, amounting on December 3d, 1870, to \$4,157.28.

The questions raised on the present appeal, under this state of facts are: First. Whether the lien of the mortgage is superior to the claims of the purchasers under the contracts. Second. If the plaintiff is bound by the contracts, whether it is not entitled to the purchase-money unpaid upon them. Third. Whether the release of the village lots by Nott does not, as between the purchasers and the plaintiff, discharge their lots from the lien of the mortgage?

1. In considering the first question it will be necessary, at the

outset, to examine the relations between Aspinwall and Nott, as well as between the latter and Stevens. When Aspinwall took the title, the common law of trusts was in full operation; he undoubtedly held the property as a trustee, both for Nott and Stevens. In other words, the payment of a portion of the consideration by each of these parties caused a trust *pro tanto* to result in their favor. This could be proved by parol evidence. (2 Washburn on Real Property, 176, par. 17, and cases cited.) When Aspinwall conveyed to Stevens he transferred an estate to him charged with a valid existing trust, of which Stevens had full knowledge. Stevens, according to elementary rules, became himself a trustee for Nott to the extent of the interest conveyed to him. (1 Spence's Eq. Jur. 512; Willis on Trustees, 64; 2 Washb. 178, par. 21.)

During the whole period from October 1, 1828, to the time of the execution of the mortgage, the relation of trustee and *cestui que trust* existed between Aspinwall and Nott, or Stevens and Nott. These trustees were accountable to Nott in a court of equity. They had the management of the estate, had the legal power to sell, and their acts were acquiesced in by the *cestui que trust* and ratified by the accountings held from time to time. Under these circumstances the purchasers under the contracts had an equity superior to that of Nott. At the moment when he conveyed to Stevens, they could have enforced the agreements against him, on payment of the residue of the purchase-money, and against Stevens, his successor in interest. Nott and Stevens held the legal title, as trustees for the purchasers under the contracts.

The sale by Nott to Stevens and the execution of the mortgage to the former worked no change in this state of things. At the moment of sale he was a trustee for the purchasers under the contract. By a familiar rule in the law of trusts he could not buy or sell to the prejudice of the *cestuis que trusts*. His sale to Stevens, and taking back a mortgage for the purchase-money, left him precisely where he was before the transaction was entered into—still charged with the execution of the trust in favor of the purchasers under the contracts. It was, therefore, quite immaterial, as far as Nott was concerned, to show that he had constructive notice of the contracts by the possession of the purchasers. His duty toward them did not depend upon notice, but upon the inherent equities of the case. Suppose that after he had sold to Stevens he had immediately repurchased from him; would he not have been subject to the same equities as he was liable to before the sale? The authorities are distinct that he would.

A mortgage could give him no more rights than an absolute purchase. It is thus clear that if Nott had remained owner of the

mortgage of July 18, 1833, and had sought to foreclose it, he would have been bound by the same equities as before his sale of that date, and would have been required to allow the claims of the purchasers under the contract.

Does the plaintiff occupy the position of Nott, or can it urge that it is a purchaser in good faith, and for value, and thus shut out the equities between the contractees and Nott, or is it governed by the rule that the assignee of a mortgage takes subject to the equities between the original parties? According to the reasoning thus far, this is a case of an inherent equity as between a person having an interest in the equity of redemption and the mortgage. The mortgage, in form, covers the property claimed by the contractees; if they do not fulfill the contract, it certainly embraces it in full. What they say to the mortgagee is this: "Owing to certain equities between us and you, it is inequitable to enforce the mortgage against property which, as a matter of law, is actually covered by it, except you respect our rights."

Is, then, the plaintiff in any better position than Nott, the mortgagee? It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more. In *Clute v. Robison*, 2 J. R. 612, the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. (2 Vern. 692, 765; 1 Vesey, 122.) The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law. (*Ingraham v. Disborough*, 4 N. Y. 421.) It goes further than this, and declares that the purchaser of a chose in action must always abide by the case of the person from whom he buys. (*Per* Lord Thurlow, in *Davies v. Austen*, 1 Vesey, Jr., 247.) The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. (*Beebe v. Bank of New York*, 1 J. R. 552, *per* Spencer, J., and 549, *per* Tompkins, J.) Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract. (*Id.* 573.) The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush v. Lathrop*, 22 N. Y. 535. A considerable number of authorities are cited by the plaintiff as tending to show that the assignee

of a chose in action is only subject to the equities between the contractor (assignor) and the debtor, and not to the so called latent equities of third persons. Such cases as *James v. Morey*, 2 Cowen, 298, opinion of Sutherland, J.; *Bloomer v. Henderson*, 8 Mich. 402; *Mett v. Clarke*, 9 Barr, 404, and others of the same class, were reviewed as to their principle or specifically in *Bush v. Lathrop*, 22 N. Y. 535, and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, J.J., already considered, was thus adopted rather than that of Kent, Ch. J. The law of some of the other States undoubtedly coincides with the views of Kent, but, since the decision in *Bush v. Lathrop*, must be regarded as without authority here.

The correct theory is well stated in 2 Story on Equity Jurisprudence, section 1040: "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession." This theory would lead to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name and on the supposition that, for the purposes of the action, he is still owner. The case of *Dillaye v. Commercial Bank of Whitehall*, 51 N. Y. 345, is not opposed to this view, as the question in that case was not one of the enforcement of a mortgage, but concerned the title of the two claimants to the ownership of the mortgage itself. The point was, whether one who held a mortgage in trust, with an apparently unrestricted power of disposition, could transfer it free from the claims of the *cestui que trust* to a purchaser in good faith. It was held that he could. This case has no tendency to establish any right on the part of the assignee in enforcing the mortgage beyond that possessed by his assignor.

The plaintiff cites, to support his view, authorities to the effect that an assignee is a purchaser, and to the effect that "a mortgage is in form a conveyance of the land and an assignment of it is another conveyance of the same land." These cases, which are very numerous in the law books, refer only to the position of a mortgagee or assignee in a court of law, and were decided in England and in States of the Union where more technical views of the rights of a mortgagee in a court of law prevail than in this State. They are of no force in a court of equity, in which the case at bar is assumed to be pending, for in such a tribunal a mortgage is but a chose in action and security for a debt. Reference is also made to a class of cases appearing in the law reports of a number of the States, holding, in substance, that when a mortgage is given to

secure a negotiable note, which is itself transferred before maturity for value, it is taken by the assignee free from all equities. It is argued that these authorities tend to show that the mortgage partakes of the nature of the debt, in such a sense that only the direct equities between the debtor and the creditor can be set up as against the assignee. These cases have not yet become established law in this State. (*Carpenter v. Longan*, 16 Wall. [U. S.] 271; *Kenicott v. Supervisors*, *id.* 452; *Taylor v. Page*, 6 Allen, 86; *Croft v. Bunster*, 9 Wis. 510.) If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence.

The result is that the plaintiff in the present case takes subject to the rights of the purchasers under the contracts, by reason of the equities between them and Nott and without reference to any actual or even constructive notice of such equities as between such purchasers and the mortgagee. . . .

The judgment of the court below should be affirmed.

All concur.

A motion having been made for reargument, the following opinion was given, on denying the motion.

DWIGHT, C. The plaintiff in this cause moves for a reargument on three grounds: First. That this court erred in holding that the plaintiff took the same position in respect to the mortgage which was the subject of foreclosure in the present action as its assignor, Nott, the mortgagee. Second. That the court should have held that, where the contracts owned by the respondents were assigned subsequent to the record of the mortgage, the plaintiff has a lien for the purchase-money unpaid at the time of such assignment. Third. That the court committed another error in holding that after Nott had made the assignment and continued the apparent owner, the assignment being unrecorded, and the respondents having no notice of such assignment, his release from the lien of the mortgage of certain portions of the premises which were primarily liable to pay the debt, was binding on the plaintiff and so discharged the respondents.

Before considering the first proposition, it will be well to recall the exact relations of the parties. Nott held a mortgage upon certain lands to which the mortgagor held the legal title, but which in part had been sold by a valid contract to some of the defendants. The validity of the contract is undisputed, as is also the fact that Nott, the mortgagee, had full notice of the equities of those defendants, and was bound in equity to recognize them.

Starting with this proposition, the counsel for the plaintiff maintains that the plaintiff, if considered as a purchaser of a chose in action without notice, is not bound to recognize the equities to which Scott would have been subject; and again, that it is a purchaser of the legal title to the land, and that it can invoke the rule that the honest purchaser of land for a valuable consideration can shut out any equities which might have existed between the mortgagor, as well those whom he represented, and the mortgagee.

In urging the first branch of this proposition, he calls our attention to the supposed fact that the case of *Bush v. Lathrop*, 22 N. Y. 535, and cited as authority in one of the opinions disposing of this cause, has been overruled, and with it, that the doctrine on which we relied has fallen. This, however, is an incorrect assumption, for that case has not been overruled as a whole, but only as to one proposition maintained in it. See *Moore v. Metropolitan Bk.*, 55 N. Y. 41. It is there stated that several propositions in *Bush v. Lathrop* were decided "with perfect accuracy." The special point in respect to which there is a conflict between the two cases is, whether an assignor of a chose in action can set up any equities affecting the title between himself and his assignee, in an action brought by a second assignee. There was no question whatever as to the equities growing out of the chose in action itself, as between the original parties to it or an assignee of the creditor. On that point the court was careful to avoid all misconstruction in using the following language: "The counsel" (for the defendant) "further insists that to apply the same rule" (of estoppel) "to non-negotiable choses in action will in effect make them negotiable. Not at all. No one pretends but that the purchaser will take the former, subject to all defences, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital." (P. 48.) The court is also careful, on pages 49, 50 of the report, to preserve the force of the cases, decided by the present Court of Appeals, which have followed *Bush v. Lathrop* in the respect referred to—cases of which *Schafer v. Reilly*, 50 N. Y. 61, is one, and bears closely upon the present discussion. The point in *Moore v. Metropolitan Bank* is simply whether the law of estoppel is applicable on the question of title as between a first assignee and a remote purchaser of a non-negotiable chose in action. It is held that it is. The rule that the chose in action itself is open to all defences growing out of the original transaction, in the hands of any assignee, no matter how remote, remains unshaken, and must continue so until elementary rules of law are overthrown.

The rule laid down by us in the case at bar is distinctly stated and affirmed in *Schafer v. Reilly*, 50 N. Y. 61. It is there said that one who takes an assignment of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons. This case emphatically approves of *Bush v. Lathrop*, so far as it holds this point, and declares its doctrine to be settled law. None of the cases, we repeat, in which the present Court of Appeals have followed that case, are to be regarded as overruled by *Moore v. Metropolitan Bank*, *supra*. It must accordingly be held to be still the law of this State, that the purchaser of a non-negotiable chose in action, secured by a mortgage, takes it subject to the latent equities not only of the mortgagor but of third persons.

The counsel of the plaintiff, however, maintains that if it be conceded that this doctrine applies to the debt it does not apply to the mortgage. His argument is, that the mortgage itself creates a legal estate in the land, and that so far as the land is concerned, an assignee of a mortgage is a purchaser of the legal estate for a valuable consideration, and entitled to exclude the equities. There is thus, according to this proposition, one rule for the land and another for the debt. If the debt were collected by action for its amount the equities would be let in; if it were collected by foreclosure of the mortgage they would be shut out. This, if true, is certainly an extraordinary proposition. It is very comprehensive in its nature, for it would exclude the equities of the mortgagor as well as the latent equities of third persons. Under our compound system of foreclosure and of obtaining a personal judgment for the deficiency, there would be one rule for the first branch of the case and an entirely different one for the last.

None of the cases cited by the counsel, on this motion for reargument, sustain his proposition as being part of our law. They have all been examined, and it is unnecessary to consider them in detail. The point is really decided against him in *Schafer v. Reilly*, *supra*. The contest in that case concerned the right to surplus moneys after a foreclosure, and was in substance a question as to the title to land, the money standing, under the doctrine of equitable conversion, in the place of land. It appeared that there was a second mortgage, of a fictitious nature, made by one John Reilly to Peter Reilly, on which nothing had been advanced, and which was of course incapable of enforcement by Peter. This was assigned to one Catherine M. Burchard, who paid a valuable consideration, acting in good faith, and upon an affidavit by the mortgagor that Peter Reilly had advanced to him the whole amount of the principal without abatement, that the whole sum remained

unpaid, and that there was no off-set, defence or counter-claim to the mortgage. The mortgage was dated and executed anterior to the claim of one Griffin, who had acquired, subsequently, a mechanic's lien upon the land, but before Mrs. Burchard became assignee. Of his rights at that time she was ignorant. The question was, who had, under these circumstances, the better right to the surplus moneys, considered as land. The court held that, notwithstanding the mortgage was, on its face, executed prior to the mechanic's lien, it might be shown by Griffin that his lien was in existence when Mrs. Burchard advanced her money, and that his right could not be affected by the mortgage. The court there broadly applied the rule, that if Griffin's claim was an equitable one and latent, it could still be set up by him against the assignee. The estoppel against John Reilly, caused by his affidavit, had no effect upon the rights of Griffin. The court rested this decision on the ground that though Griffin's right might be a latent equity, yet the assignee must take the mortgage considered as an interest in the land, and not merely the debt, subject to the equity. The same class of cases that were relied upon by the plaintiff's counsel in the argument of the present motion were cited to the court, as showing that the assignee of the mortgage was a purchaser for value. Their application to the subject in hand was denied, and the rule of Lord Thurlow, in *Darves v. Austen*, 1 Ves. 247, was pronounced to be the principle governing the case. "A purchaser of a chose in action must always abide by the case of the person from whom he buys." (*Schafer v. Reilly*, 50 N. Y. 67, 68.) This was the precise ground on which the case at bar was rested.

The plaintiff is mistaken in the supposition that the present case is one merely of notice of equitable rights on the part of third parties to Nott, the mortgagee, and, accordingly, that it is not bound by the notice under the ordinary doctrines applied to the purchaser in good faith, and for a valuable consideration, acquiring title to lands. On the contrary, the difficulty is that Nott took his mortgage, subject to the older and better title of the contractees. To their estate his mortgage never attached in equity. The land belonged to them in equity, and the most that Nott could acquire under any circumstances, as against them, was a lien for the unpaid purchase-money. This is not an interest in the land but only in the money, and to be obtained by an assignee of Nott in no manner, except by due notice of the mortgage and assignment given to the contractees. The plaintiff simply acquired Nott's rights, and stood in his place, according to *Schafer v. Reilly*, *supra*. (See also, *Andrews v. Torrey*, 1 McCarter [N. J.] 355.) The cases of *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Jackson v. Henry*, 10

J. R. 185; *Varick v. Briggs*, 6 Paige, 323; *Fort v. Burch*, 5 Den. 187, and others cited by the appellant, have no application to the case at bar. Those and others of the same nature are either cases of title obtained by fraud, or involve the effect of notice under the recording acts, or are instances of mortgages accompanying negotiable notes, and declared to partake of the character of the note. They are noticed and distinguished in *Schafer v. Reilly*, *supra*, and it is unnecessary to spend time upon them.

It should be added that, under the rules of equity jurisprudence, it is essential that one who claims to exclude an earlier equity must show that he is not only a purchaser, but has acquired the legal estate. What evidence was there, in the case at bar, that the plaintiff had acquired the legal estate? The complaint merely alleges an assignment of the debt and mortgage in writing. The referee only finds an assignment in writing. There is not a word anywhere concerning the acquisition of the mortgage by a deed or other instrument under seal. If the mortgagee had the "legal" estate, he did not transfer it by such an instrument as the law requires to transfer a freehold estate in land. The plaintiff was, undoubtedly, the equitable owner, by force of the assignment of the bond and the mortgage accompanying it, but that was not enough. The legal title must pass. (*Peabody v. Fenton*, 3 Barb. Ch. 451.) The authorities, to the effect that a deed or other mode of conveyance is necessary to pass the legal estate, strongly preponderate. (*Den v. Dimon*, 5 Halst. [N. J.] 156; *Warden v. Adams*, 15 Mass. 233; *Jackson v. Myers*, 11 Wend. 533, 539; *Morrison v. Mendenhall*, 18 Minn. 232; *Cottrell v. Adams*, 2 Bissell, 351; *Olds v. Cummings*, 31 Ill. 188; *Partridge v. Partridge*, 38 Penn. St. 78; *Graham v. Newman*, 21 Ala. 497; *Lyford v. Ross*, 33 Me. 197; *Smith v. Kelley*, 27 *id.* 237; *Givan v. Tout*, 7 Blackf. 210; 2 Washburn on Real Property [3d ed.], page 113, paragraphs 12 and 16, and cases cited.) Such cases as *Green v. Hart*, 1 J. R. 590; *Jackson v. Blodget*, 5 Cow. 292, and *Jackson v. Willard*, 4 J. R. 43, do not affect this question, as the matter of passing the legal title to the mortgage was not in controversy. *Johnson v. Hart*, 3 J. Cas. 322, only decides that by the transfer of the debt an equitable title to the mortgage passes.

It is, however, not our intention to hold that the legal estate, under the present law of this State, ever does or can pass from the mortgagee to the assignee. On the other hand, it is now settled law that the mortgage is but a lien upon the land. The mortgagor, both in law and equity, is regarded as the owner of the fee, and the mortgage is a mere chose in action, a security of a personal nature. An assignment of a mortgage, in this view, cannot pass

the title. (*Jackson v. Myers*, 11 Wend. 533, 539; *Kortright v. Cady*, 21 N. Y. 313; *Trimm v. Marsh*, 51 *id.* 599, 601; *Stoddard v. Hart*, 23 *id.* 559, 560; *Power v. Lester*, *id.* 527.) Rules owing their existence to a contrast between law and equity, and giving the later holder of a legal title a preference over an earlier holder of an equitable title, are not to be applied to a state of the law so entirely different from that which prevailed when the law of mortgages first originated. In other words, the power of a vendee of land to convey to a second purchaser, so as to shut out the equities between himself and the original vendor, is not to be referred to for the purpose of ascertaining the capacity of a mortgagee when he makes an assignment of the mortgage to shut out the equities between himself and the mortgagor, and those whom the mortgagor represents. If that rule were ever a part of the law of mortgages, the development of that branch of jurisprudence in this State demands that it should be discarded.

The motion for reargument is denied.

All concur.

DAVIS v. BECHSTEIN.

COURT OF APPEALS OF NEW YORK, 1877.

(69 N. Y. 440.)

This was an appeal from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, modifying the judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and as modified affirming the same.

This action was brought to have a bond and mortgage on lands belonging to plaintiff set aside and cancelled. The bond and mortgage were executed by plaintiff and her husband to Lawrence A. Riley, and delivered to him as an accommodation, to be used as collateral security for the payment of a note, which he contemplated getting discounted, and under an agreement with him that he should not have it recorded. Riley failed to procure the discount and plaintiff repeatedly requested the return of the bond and mortgage: Riley promised to return the same from time to time, but failed to do so, had the mortgage recorded, and assigned the bond and mortgage for a valuable consideration to the defendant, Bechstein. Plaintiff's husband was not made a party to this

action. It did not appear that he had any interest in the real estate covered by the mortgage. A judgment was entered in favor of the plaintiff, declaring the bond and mortgage in suit void, and directing that defendant Bechstein surrender and deliver up the same. The General Term modified this judgment so as to declare the bond and mortgage void only as against plaintiff, and that the register of the city and county of New York be required to enter upon the record of the mortgage that it was adjudged void as against plaintiff, striking out the provision in the judgment directing the mortgage to be surrendered up and cancelled.

CHURCH, Ch. J. Neither the decision in *McNeil v. The Tenth National Bank*, 46 N. Y. 325, nor in *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, affect the question involved in this case. Those cases hold that the owner of a chose in action is estopped from asserting his title against a *bonâ fide* purchaser for value, who purchased upon the faith of an apparent absolute ownership by assignment, conferred by the owner upon the assignee and seller, but neither of them intimated an intention to interfere with the well settled principle, that a purchaser of a chose in action takes it subject to the equities between the original parties, and that the assignor can give no better title than he himself has. On the contrary, Grover, J., in the last case declared, in answer to the suggestion that these principles might be impaired by the decision, that "no one pretends but that the purchaser will take the former (non-negotiable choses in action) subject to all defences valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse." It is only where the owner, by his own affirmative act, has conferred the apparent title and absolute ownership upon another, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel.

At the time Riley transferred the bond and mortgage to the defendant Bechstein, as between him and the plaintiff, the mortgagor, he had no title or interest which he could transfer. The mortgage was executed and delivered to him as an accommodation, to be used as collateral security for the payment of a note of \$2,000, which he contemplated getting discounted at the New York National Exchange Bank, and under an agreement not to have it recorded. He failed to procure the discount, and the plaintiff repeatedly requested the return of the bond and mortgage, and Riley promised to return the same from time to time. It is very clear that the bond and mortgage in his hands were of no value, and that he could not have enforced them, and the defendant, when he

purchased, occupied no better position. Riley could not sell any better title than he had, which was none, and the defendant could not acquire by the purchase from him any better title. The specific transaction in which the mortgage was to be used having failed, Riley's possession and right to the mortgage after that was no different than if it had been delivered to him without any agreement for its use at all. He was then the possessor of the bond and mortgage executed and delivered without consideration, and without authority to use it for any purpose. I have examined the evidence and am of the opinion that it is sufficient to sustain the findings of the Judge, and therefore the findings are conclusive. The husband was not made a party, and a mis-trial is claimed for this reason. He had no interest, as it appears, in the real estate, and the defect should have been taken by answer or demurrer. Otherwise it is deemed waived. (Code, § 148.)

The General Term modified the judgment, so as to preserve all the rights of the defendant against the husband, and he cannot in any event be injured.

The judgment must be affirmed.

All concur; RAPALLO, J., not voting.

*Judgment affirmed.*¹

NEW JERSEY GEN. STAT., 1896. MORTGAGES § 31 (p. 2108). [It is enacted] That all mortgages on land in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and such assignments shall pass and convey the estate of such assignor in the mortgaged premises, and the assignee may sue thereon in his own name; but in such suit there shall be allowed all just off-sets and other defenses against the assignor that would have been allowed in any action brought by him and existing before notice of such assignment. . . .

§ 32. That the clerks of the several counties of this State be and they are hereby authorized to record in suitable books to be provided for that purpose any assignment of any mortgage upon

¹*Westfall v. Jones*, 23 Barb. (N. Y.) 9 (1856), and *Hill v. Hoole*, 116 N. Y. 299 (1889), *accord*. But see *First Nat. Bank of Congo v. Stiles*, 22 Hun. 339 (1880), in which it was held that a mortgage in the usual form, given to raise money for the mortgagor, but improperly negotiated and assigned by the mortgagee for his own purposes, "by the very form of the mortgage itself" created an estoppel against the mortgagor and those claiming under him. To the same effect see *Commonwealth v. Connel's of Pittsburgh*, 34 Pa. St. 496, 520 (1859), and compare *Davis v. Burr*, 9 S. and R. (Pa.) 137 (1822) and *McMasters v. Wilhelm*, 85 Pa. St. 218 (1877).

lands within their respective counties. . . .; and such recording shall be notice, from the time such assignment is left for that purpose, to all persons concerned that said mortgage is so assigned. . . .

§ 34. That when any assignment hereafter made is not recorded, as in this act provided, any payments made to the assignor in good faith, and without actual notice of such assignment, and any release of said mortgaged premises or any part thereof, to a person not having actual notice of such assignment, shall be as valid as if said mortgage had not been assigned.

NEW YORK REAL PROP. LAW, § 271 (1 R. S. 763, § 41).—The recording of an assignment of a mortgage is not in itself a notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee.

CHAPTER V.

DISCHARGE OF MORTGAGE.

SECTION I. TENDER AND PAYMENT.

(a) *In General.*

LIT. §§ 334, 335, 337, 338, 339, and CO. LIT. 209,
reprinted at pages 9-11, *supra*.

LIT. § 340. Also, upon such case of feoffment in morgage, a question hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in morgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee bee not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seeke the feoffee if he bee then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10 pound, then the obligation of 20 pound shall lose his force, and bee holden for nothing; in this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the summe of 20 pound comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to bee made upon the land, &c., no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In his case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said that the estate of the land is depending

upon the condition, then to say that the condition is depending upon the land, &c. *Sed quære*, &c.

Co. Lit. 210. "*Item, sur tel case de feoffment en morgage, question ad este demande, &c.*" Here and in other places, that I may say, once for all, where Littleton maketh a doubt, and setteth down severall opinions and the reasons, he ever setteth downe the better opinion and his owne last, and so he doth here. For at this day this doubt is settled, having beene oftentimes resolved, that seeing the money is a summe in grosse, and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the later opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money and things ponderous, or of great weight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient for him to tender it upon the land, because the state must passe by liverye.

"*Deins le roialm d'Engleterre.*" For if he be out of the realme of England hee is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

"*De tender,*" or *tendre*, is a word common both to the English and French, in Latine *offerre*; and in that sense, and with that Latyn word it is alwayes used in the common law.

LIT. § 342. And therefore it wil be a good and sure thing for him that will make such feoffment in morgage, to appoint an especial place where the money shall be payd, and the more speciall that it bee put, the better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within foure houres next before the hour of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shall be lawfull to the aforesaid A. and his heires to enter, &c., in this case he needeth not to seek the feoffee in an other place, nor to bee in any

other place, but in the place comprised in the indenture, nor to bee there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

§ 343. Also, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limited. But yet if he doe receive the payment in another place, this is good enough and as strong for the feoffor as if the receipt had bene in the same place so limited, &c.

§ 344. Also, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in ful satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if hee had received the summe of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in ful satisfaction.

BURGAINE v. SPURLING, Cro. Car. 284 (King's Bench, 1633). *Ejectment*. All the Court agreed that whereas in the principal case the condition was for the payment of 1060*l.* upon the first of July, and the payment was made before the first of July, viz., upon *decimo sexto Junii*, and an acceptance thereof, it is a good performance of the condition.

TITLEY v. DAVIS, 2 Eq. Cas. Abr. 604 (Chancery, 1739). A mortgages two estates, viz., Blackacre and Whiteacre, to B., and afterwards mortgages Blackacre to C. and after that Whiteacre to D. The question was, whether the Court can decree a redemption of B.'s mortgage, who was the original mortgagee, by proportionable contributions of C. and D., the two puisne mortgagees.

And LORD CHANCELLOR [HARDWICK], after consideration, was of opinion that the Court could not decree such a redemption; that the original mortgagee ought not to be intangled with any questions that may arise among subsequent mortgagees; that he has a right to be redeemed intire and not by parcels; and his right undoubtedly stood so with regard to the mortgagor, and consequently with regard to the subsequent mortgagees; for the mortgagor could not hurt him by playing his right into another's hands, nor is there any precedent where such a redemption was ever allowed.¹

¹*Street v. Beal*, 16 Ia. 68 (1861); *Coffin v. Parker*, 127 N. Y. 117 (1891), and the authorities generally, accord.

BROWN v. COLE.

HIGH COURT OF CHANCERY, 1845.

(14 *Sim.* 427.)

Bill to redeem a mortgage for a term of years made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises on being repaid the money lent on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee the amount of the principal and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed; in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE CHANCELLOR [SHADWELL] allowed the demurrer on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose had arrived.¹

GIBSON v. CREHORE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827.

(5 *Pick.* 146.)

This was a bill in equity, in which the plaintiff, as widow of Abraham Gibson, claimed the right to be let into her dower in two parcels of real estate in Boston, in the occupancy of the defendant.

The bill alleges that on the 10th of July, 1816, A. Gibson died, leaving the plaintiff his widow; that he was then seised of the premises, subject to a mortgage to P. C. Brooks, dated November 18, 1814, to secure the payment of 15,000 dollars in two years with semiannual interest; that his estate was represented as insolvent, and that Brooks proved the debt before the commissioners of insolvency; that the assets of the estate were sufficient to pay 90

¹ *Abbe v. Goodwin*, 7 Conn. 377, 384 (1829), *accord*.

cents on the dollar; that on the 26th of November, 1817, the premises were sold by the administrators, subject to the mortgage, and were purchased by the defendant; that the defendant, as a condition of the sale, gave his bond to the administrators to pay, take up, and discharge the mortgage as his proper debt, and that he entered under his deed from the administrators, which contained a stipulation that he should discharge the mortgage; that he afterwards, on the 8th of January, 1818, procured from Brooks an assignment of the mortgage and diverted the assets, holding the mortgage as a subsisting incumbrance, instead of discharging it according to his obligation. The plaintiff further alleges that, as to her, the assignment is inoperative and the mortgage discharged, or if not, that the assignment ought to stand for so much only as would remain due on the mortgage after deducting what the assets, if properly applied, would have paid. She further states that the defendant pretends that her rights, if she ever had any, were foreclosed by an entry under the mortgage on the 13th of February, 1818, and subsequent possession, but she avers that no such right of entry then existed in the defendant, he having before that time conveyed the estate by deed of mortgage to one Parker, and the assignment being inoperative, and that, if any such right did then exist, there has been no foreclosure, because at the time of the supposed entry the defendant was, and for a long time before had been, in the actual occupancy of the premises, having entered under his deed from the administrators; that the supposed entry was made in the absence of the plaintiff and entirely without her knowledge; that the defendant had never given her any notice of it, and that she was wholly ignorant, until shortly before the filing of her bill, that the mortgage was treated as having any force whatsoever, and that as soon as it came to her knowledge that it was set up by the defendant as a subsisting incumbrance, she offered to redeem and requested the defendant to state an account.

The defendant, in his answer, alleges that the plaintiff joined in the execution of the mortgage and thereby released her right of dower, and he denies that she is entitled to dower. He denies that the assets in the hands of the administrators should have been applied to the payment of the mortgage debt, or that he was bound to see to the application of the assets. He admits that he entered into a bond to pay, take up, and discharge the debt secured by the mortgage, so far as to save the intestate's estate harmless from the same, but denies that he engaged to release or extinguish the mortgage, and also denies that the administrators, in taking the bond, represented in any respect the plaintiff in her capacity of widow, or that the bond had any reference to her rights as widow. He al-

leges that about the 8th of January, 1818, for the sum of 16,540 dollars paid by him, he procured an assignment of the mortgage, and continued to hold it as a valid security for the original debt and interest, until it was foreclosed by virtue of an entry made by him on the 13th of February, 1818, in the presence of two witnesses, and a subsequent possession for three years; but that if the foreclosure cannot be sustained, the whole amount of the original debt, with interest computed semiannually, is still due to the defendant, after deducting such rents as he may have received beyond the amount of repairs. He alleges that at the time of his entry for foreclosure on the 13th of February, 1818, he had good right of entry for the purpose of foreclosing against all persons, except Parker, and that the mortgage to Parker, who never entered by virtue thereof, has been discharged.

The opinion of the Court was drawn up by

WILDE, J. That the widow of a mortgagor is entitled to redeem the mortgage is a necessary inference from the doctrine repeatedly laid down as the law of Massachusetts, that a widow is dowable of an equity. It is a familiar principle in courts of equity, that every person interested in an estate mortgaged is entitled to redeem; and this principle is confirmed, if it requires confirmation, by St. 1798, c. 77, by which it is enacted, "that the mortgagor or vendor, or other persons lawfully claiming under them, shall have right to redeem." If therefore a widow can lawfully claim under her husband, of which there can be no question, she has a right to redeem, by the express words of the statute.

The objection, therefore, to the plaintiff's right to redeem is clearly unfounded, unless it can be maintained that a legal assignment of dower is an essential requisite to complete her title. It is true that before such assignment she cannot enter on any part of the land, for it cannot be ascertained in what part her dower will be assigned; nor can she maintain a writ of entry, for her legal right is inchoate. But an assignment of dower is not necessary to enable her to maintain a suit in equity for the purpose of redeeming the mortgage, because the assignment of dower does not affect her equitable right of redemption, and because she has no right to demand such assignment as against the mortgagee before she redeems the mortgage. Nor is an assignment of dower by the heirs necessary, because, as will be shown hereafter, she could not redeem a part or parcel of the mortgaged premises without redeeming the residue also, if required so to do by the mortgagee. The assignment of dower, therefore, is of no importance, and is not necessary to perfect her title to redeem the mortgage.

[The Court then proceeds to consider various objections to decreeing a redemption by the plaintiff, and holds, 1st, that the Court

has plenary jurisdiction to make such a decree; 2d, that the assignment of the mortgage to the defendant, when he was possessed of the equity of redemption, did not operate as a merger and extinguishment of the mortgage; 3d, that the plaintiff is not entitled to have the mortgage discharged out of the personal estate of the intestate; 4th, that the plaintiff, not being a party to the bond of indemnity given to the administrators, cannot take advantage of it; 5th, that the entry and possession of the defendant are not sufficient in law to foreclose the mortgage; and proceeds as follows:—

Considering, then, that the plaintiff's right to redeem is not extinguished by the defendant's entry and possession under the mortgage, we are to decide upon what terms and to what extent she is now entitled to redeem.

As the defendant has purchased the equity, as well as the mortgage, it would seem equitable to allow the plaintiff to redeem a third part of the mortgaged premises, by paying her equitable portion of the mortgage debt, according to the value of her right of dower as compared with the residue of the estate. But this cannot be done without infringing the defendant's rights as assignee of the mortgage. He stands in the place of the mortgagee, and has an undoubted right to insist on his whole debt. Nor can he be compelled to be redeemed by parcels, for by thus dividing the estate the income or value of the whole may be reduced. The rule therefore is, when several are interested in an equity of redemption and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when perhaps it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity in relation to contribution, but has the right to insist on an entire redemption. If, therefore, several estates are mortgaged by one mortgage, and the mortgagor afterwards conveys the estates separately to different persons, although each owner of the separate estates may redeem, yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion. He is considered as assignee of the mortgage, and stands, after such redemption, in the place of the mortgagee in relation to the other owners of the equity. So if there be tenant for life and remainderman of an equity, either may redeem, but not without paying the whole mortgage. In like manner a dowress or jointress of lands mortgaged may redeem, she

paying the mortgage debt, and may hold over, if the heir refuses to contribute, until she and her executor shall be repaid with interest. (*Palmer v. Danby*, Prec. Ch. 137; *Saville v. Saville*, 2 Atk. 463; *Banks v. Sutton*, 2 P. Wms. 716; *Elwys v. Thompson*, 9 Mod. 396; 15 Viner, 447; *Ex parte Carter*, Ambl. 733; Powell on Mortg. 392, 708, 709, *in notis*.)

If the defendant had redeemed the mortgage, the plaintiff would have been let in by contributing her portion of the mortgage debt, according to the value of her life estate in one-third part of the mortgaged premises, in conformity with the rule adopted in the case of *Swaine v. Perine*, 5 Johns. Ch. Rep. 482. But as the defendant, being assignee of the mortgage, insists on the payment of the whole mortgage debt, the plaintiff cannot redeem on any other terms. After redemption, she will hold as assignee of the mortgage, but will be bound to keep down one-third of the interest during her life, and may hold over for the residue of the mortgage debt. The defendant must be held to account for the rents and profits from the time of his entry under the mortgage; for although this entry cannot operate by way of foreclosure, for want of notice to the plaintiff, yet it is sufficient to charge him with the reception of the rents and profits.

The case must be referred to one of the masters in chancery to take an account accordingly, and redemption will be decreed upon payment of the debt which remains due on the mortgage after deducting the rents and profits.

GROVER v. FLYE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863.

(5 *Allen*, 543.)

WRIT OF ENTRY. The demandants claimed title under the levy of an execution by selling the equity of redemption of the premises.

At the trial in the Superior Court, before Lord, J., it appeared that at the time the levy was made the premises appeared on record to be subject to a mortgage to the Blackstone Loan and Fund Association, to secure certain sums of money, a portion of which was not then due; that full payment of said sums had been made and a discharge of the mortgage and release of the premises by the said association executed before the levy, but the discharge and release

were not recorded until afterwards; and that neither the judgment creditor nor the officer had actual or constructive notice of such discharge until the record thereof. The judge ruled that it was immaterial, for the purposes of this action, whether the mortgage upon the premises had been discharged, unless the creditor or officer had actual or constructive notice thereof before the seizure of the land on the execution, and that a sale of the equity without such notice was regular and proper.

The jury returned a verdict for the demandants, and the tenant alleged exceptions.

BIGELOW, C. J. It is admitted that the sums due on the mortgage to the Loan Fund Association were paid before the sale of the right in equity to redeem was made by the officer; and that these payments were made at or before the times when the several instalments became due according to the stipulation set forth in the condition of the mortgage and the bond which accompanied it and formed part of the transaction. By such payment, on familiar principles, the condition was saved and the mortgagor, the tenant, was in of his old estate. No conveyance or discharge of the mortgage was necessary to revest the estate in the mortgagor, or to defeat the title of the mortgagee. (*Merrill v. Chase*, 3 Allen, 339, and cases cited. *Joslyn v. Wyman*, ante, 62.) The argument, therefore, of the demandants, founded on the necessity of recording a release or discharge of a mortgage in order to defeat a title acquired by a judgment creditor by a sale on execution of a right in equity made after such release or discharge but without actual notice thereof, falls to the ground. The act of payment in the country *ante vel apud diem* saves the forfeiture of an estate held by a conveyance defeasible on a condition subsequent. No record of such an act is necessary to make the estate a fee simple estate in the grantor or mortgagor, as against all persons claiming by a subsequently acquired title. The release of the Loan Fund Association to the mortgagor was a useless and superfluous act, which added nothing to the strength of the title which he had acquired by a performance of the condition of the mortgage before a breach.

It follows that the title of the demandants under the sale of the right in equity to redeem the estate is invalid. The premises being unincumbered and held by the judgment debtor as an estate in fee at the time of the service of the execution, could be legally levied on only by an appraisement, and set off in the mode prescribed by law. (*Forster v. Mellen*, 10 Mass. 421. *Freeman v. McGaw*, 15 Pick. 82. *Perry v. Hayward*, 12 Cush. 344.)

Exceptions sustained.

(b) *After Default.*

EMANUEL COLLEGE *v.* EWENS, 1 Ch. Rep. 18 (Chancery, 1625).¹ That the Earl of Huntington, seised in fee of the Manor of North-Cabury, with advowson appendant, and for payment of debts by way of mortgage, 25 Eliz., made a lease for 500 years of the said manor, with appurtenances, not mentioning the advowson by express name, with a clause of redemption, and for advancement of learning and religion, of his free disposition in 28 Eliz. by deed granted the said advowson to Sir Francis Hastings, and others, and their heirs, to the use of the said Earl for life, remainder to the Master, Fellows, &c., of the said college, and their successors forever; and shortly after in the same year paid his said debts. And this court conceived the said lease, being but a security, and that money paid, the said lease being void, as well against the said college as against any other; and though the money not paid at the day, but afterwards, the said lease ought to be void in equity as well as on a legal payment, it had been void in law against them.

MANNING *v.* BURGES, 1 Ch. Cas. 29 (The Rolls, 1663). A mortgage was forfeited; the mortgagor afterwards meeting the mortgagee, said, "I have moneys; now I will come and redeem the mortgage." The mortgagee said to him he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; but it did not appear that the mortgagee was within, or that the tender was made to him; and it was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness.

A like case between *Peckham* and *Legay* about a year since.

LUTTON *v.* RODD, 2 Ch. Cas. 206 (Chancery, 1675).—A deed in the nature of a mortgage and covenant to reconvey on payment: the money was tendered at the day and place, and re-

¹A portion only of the case as reported is here given.

fused: Decreed, the money without interest from the time of the tender, and to reconvey, though that the plaintiff ought to make oath that the money was kept and no profit made of it.¹

WILTSHIRE v. SMITH.

HIGH COURT OF CHANCERY, 1744.

(3 *Atk.* 89.)

A bill was brought to redeem a mortgage on the 8th of May, 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of February, 1741, because the plaintiff had given six months' notice to pay off the mortgage, and on that day tendered the principal and interest and a deed of assignment, but the defendant absolutely refused to take the money.

The defendant swears that he offered to take the money, provided he might have time to consider of it and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney, whether they were such as he might safely execute.

LORD CHANCELLOR [HARDWICKE]: There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out, for they are generally attended with circumstances that explain the refusal, and are nothing more than causes cooked up by country attorneys to make themselves business. The plaintiff did not, as he ought to have done, send a draft of the assignment to the defendant any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money or execute the deed of assignment. If this had been the fact, it would have been unconscionable and unreasonable in the defendant.

But the person who was to take an assignment of the mortgage swears that the defendant desired further time or to that effect. The question is, Who was in the wrong? The plaintiff certainly was. For where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them

¹*Gyles v. Hall*, 2 P. Wms. 378 (1726), *Stow v. Russell*, 36 Bl. 18 (1864), and the authorities generally, *accord*.

over; and the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or, as I said before, he should have sent a copy or the ingrossment of the assignment.

But the subsequent transaction and what passed before the filing of the bill explains it. Did ever a mortgagor, as is the case here, after he was put under this difficulty, lie by a year and quarter without bringing a bill to redeem? What could be the reason? Why, the plaintiff, the mortgagor's attorney, told him, You have made a tender of your mortgage money, and the defendant's refusal has forfeited his interest; for that you may keep the money, and by a bill compel the defendant to take the principal, without interest, from the time of the tender.

LORD HARDWICKE ordered that it be referred to a master to take an account of what was due to the defendant for principal, interest and costs on the mortgage, and on the plaintiff's paying to the defendant what the Master shall certify to be due within six months after he has made his report, it was decreed the defendant should assign the mortgaged premises, as the Master should direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do stand dismissed.

MAYNARD v. HUNT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827.

(5 Pick. 240.)

Writ of Entry. The defendant declared upon his seisin in fee and in mortgage and a disseisin by the tenant.

The tenant pleaded: First, *nul disseisin*.

Secondly, that Nathaniel Maynard, the mortgagor, assigned the premises to the tenant, with warranty against all incumbrances, and that the tenant, after condition broken, but before action was brought, tendered \$400 for the discharge of the mortgage. The demandant took issue on the tender.

Thirdly, that in consideration that the tenant would forbear to make the tender, the demandant promised that the tenant should hold the land discharged of the mortgage, and that he (the de-

mandant) would resort to Nathaniel Maynard for payment of the note, which was secured by the mortgage. Issue was taken on this plea.

Fourthly, a plea like the second, except that it alleged a tender of \$450. Issue was taken on the tender.

The cause was tried before Putnam, J., and a verdict was found for the tenant upon all the issues.

The demandant thereupon moved in arrest of judgment, because the three last issues were immaterial, and the first issue was found only for form's sake and as a consequence of the finding on the other issues.

He further moved that if any of these three issues should be adjudged immaterial the Court would grant a new trial, because no evidence had been introduced sufficient or proper to maintain either of them on the part of the tenant, and because all the evidence in the case, the three last pleas and the admission of the tenant's counsel show that the finding of the first issue for the tenant was a consequence of finding the other issues in his favor, and that, if that issue had stood alone, it would have been found for the demandant.

At the trial J. W. Hunt, the brother of the tenant, testified that, at the tenant's request, he called on the demandant and inquired how much was due upon the note. The demandant replied \$400. The witness asked him if he intended to call upon the tenant for the land, if Nathaniel Maynard (who was the defendant's son) should be unable to pay the note. He answered in the affirmative. The witness said he would pay him \$100; that he came for the purpose of settling with him; that he had the money with him in bank bills, and that he would get the specie if it would make any difference. The demandant said it would not. He also said that if he took the money the tenant would immediately sue Nathaniel. The witness told him that he could expect nothing else. The demandant then said that he would not take the money; he would rather it should lie as it was on interest; he was secure; but he assured the witness that his brother should not be hurt.

The question whether this evidence was sufficient to warrant the finding of the jury was reserved for the determination of the whole court.

PARKER, C. J. It is very clear that all the issues except the first are immaterial, and that the first was found for the defendant against all the evidence in the case which could legally bear upon it. The mortgage deed produced by the demandant entitled him to a verdict on the first issue, there being no payment or tender of payment of the money due, according to the condition, until

four years after the condition broken, so that the demandant's title at law was perfect, subject only to be defeated by a process in equity, founded upon payment or tender of payment after condition broken and before foreclosure.

If judgment should be rendered on the verdict in favour of the tenant, the demandant would be entirely deprived of his security and probably of his debt, without any consideration or equivalent, for we cannot consider that the loose conversation testified to by the brother in regard to his claims has proved any intention to give up his security, or that it can have the effect of a release or discharge of the mortgage in law or in equity.

Whether a tender or any fact equivalent was proved is wholly unimportant, as the tenant's right at that time subsisted wholly in equity, and he could not otherwise enforce it than by a bill in equity. The tenant's counsel has reminded us since the argument that no objection was taken at the trial to the time of the supposed tender, and he refers us to the case of *Arms v. Ashley* (4 Pick. 71) to show that it could not afterwards be raised. But the cases are wholly different. In the case cited the point was that a fact capable of proof, but omitted to be proved or called for at the trial, was, on the hearing of the questions reserved, stated as a ground of objection to the verdict. In his case the point on which the cause turns appears on the record and in the proceedings, and, from the tenant's own showing, no other evidence touching it could have been produced had the question been made at the trial, for the tenant's right to tender it did not exist until long after the tender could have defeated the demandant's title at law. Admitting that payment tendered and received after condition broken and before foreclosure would be a sufficient defence to an action brought by the mortgagee for possession, it would not follow that a tender not accepted would be. The first might operate as a discharge of the debt and waiver of the breach of the condition, and it might be unreasonable to allow the mortgagee to recover possession, when, by another suit, he would be immediately obliged to surrender it. But the case of a tender is different. The debt is not discharged, and it is only in equity that the mortgagor can avail himself of it.

The proper course in this case is for the plaintiff to recover the conditional judgment, as in the case of mortgage, unless the tenant has a better defence than is shown by the report of the case.

*Verdict set aside and new trial granted.*¹

¹ *Rowell v. Mitchell*, 68 Me. 21 (1876), accord.

STEWART v. CROSBY.

SUPREME JUDICIAL COURT OF MAINE, 1863.

(50 Me. 130.)

This was an action of assumpsit to recover back money paid to the defendant for his release of an equity of redemption of certain premises, which the defendant represented to the plaintiff he had purchased and owned.

At *Nisi Prius*, Tenney, C. J., for the purpose of giving progress to the cause, ruled upon certain questions of law, and a verdict by consent was taken for the plaintiff for a sum agreed upon by the parties. The questions raised by the defendant's exceptions, and the facts in the case, sufficiently appear from the opinion of the Court.

The opinion concurred in by a majority of the Court was drawn up by

DAVIS, J. The defendant, having claims against one Charles Hanson, commenced suits thereon, and caused his right of redeeming certain real estate, previously mortgaged by him, to be attached, September 15, 1848. Judgments were recovered February 17, 1854; executions were issued March 17, and Hanson's right of redemption seized thereon the same day; and, on April 22 of the same year, the officer duly sold to the defendant all of Hanson's right to redeem which he had at the time of the attachment.

October 23, 1854, the defendant sold to the plaintiff, by a quit-claim deed, "all the right, title, and interest acquired by him by virtue of his deed" given to him by the sheriff upon the sale referred to. The plaintiff, upon inquiry, afterwards ascertained that Hanson, after the attachment, and before the seizure of his right of redemption upon the executions, had fully paid the mortgage debt. But the mortgage had not been discharged, either by an entry upon the record or in any other manner.

The plaintiff claims that such payment was itself a discharge of the mortgage, so that Hanson's title was no longer a *right of redemption*, which could be sold by the sheriff, but a *fee*, upon which the execution should have been *extended*. And he has brought this suit to recover back the purchase money, on account of the failure of title.

The defendant does not concede that the plaintiff would be entitled to recover, if there was a failure of title, as he has alleged, as he gave a mere release, with no covenants of title. But he contends that the mortgage was not discharged by payment merely;

and that, if the mortgage debt had been paid, it was a benefit, and not an injury, to the plaintiff.

In the case of *Martin v. Mowlin*, 2 Burrow, 978, Lord Mansfield is reported to have said, "a mortgage is a charge upon the land, and whatever would give the money will carry the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. . . . The assignment of the debt, or the forgiving it, will draw the land after it, as a consequence, though the debt were forgiven only by parol," &c. The case under consideration was a suit at law; and the confounding of principles of law with those which prevail in equity, only, is probably due to the reporter, whose language it is. For he admits, in publishing his notes of cases, that he did not always take down the restrictions with which a proposition was qualified, "to guard against its being understood universally, or in too large a sense." (1 Burr. 9.)

It is worthy of notice that in that case, as generally in English mortgages, the condition was that, upon performance, the mortgagee should reconvey the premises, and not, as in this country, that the deed should be void. It would seem, therefore, to be certain that payment on the law day would not have revested the title in the mortgager without such reconveyance. *Harrison v. Owen*, 1 Atk. 526; 2 Cruise (London ed.) 110. Upon mortgages to be void upon performance, such as are usually given in the United States, it is everywhere conceded that payment before condition will divest the mortgagee of his title, without reconveyance, or other discharge. (1 Washburne on Real Prop. 543; *Whitcomb v. Simpson*, 39 Maine. 21; *Holman v. Bailey*, 3 Met. 55.)

In this country there has been a constant tendency to apply the views attributed to Lord Mansfield indiscriminately, at equity and in law. Sustained by such jurists as Chancellor Kent, Judge Story, and Mr. Greenleaf, it is not strange that the weight of authority should turn in that direction. But in Maine, Massachusetts, Connecticut, and in several other States, the old doctrines of the common law still prevail. Though in equity the mortgage is an incident, and the debt the principal thing, at law the mortgage is a conveyance of the title, to be defeated upon a condition subsequent. Unless thus defeated, the legal title is in the mortgagee. He may assign the debt without the mortgage, in which case he holds the mortgage in trust for such assignee. Or he may assign the mortgage without the debt, or the mortgage to one and the debt to another, the owner of the mortgage always holding in trust for the owner of the debt. So that the assignment of the debt operates as the equitable, but not as the legal assignment of the

mortgage. And payment of the debt, after condition broken, does not divest the mortgagee of his legal title; but the mortgager must resort to equity for a release, or a reconveyance. These principles, though extensively denied in this country, are sustained by so many decisions in the States before referred to that it is unnecessary to cite them (1 Washburn, 553; 1 Hilliard on Mort. 476.)

Mr. Greenleaf collects the authorities in the first volume of his edition of Cruise, and in support of the opposite doctrine suggests that the acceptance of payment, after condition broken, is a waiver of the condition, and has the same effect as a performance of it. (1 Greenl. Cruise, 595.) But this is more specious than sound. A waiver of the condition may operate to confer the same rights as a performance of it. This is the case in regard to bonds for the conveyance of real estate. But it does not follow that such a waiver can operate, by our laws, to convey or release a legal title to real estate. It cannot do so, in the case of a mortgage, any more than of a bond. So that this theory, like all others in support of the doctrine, rests upon a denial that the mortgagee has the legal title, until after foreclosure.

But another answer to it is, that such an acceptance of payment is not a waiver. A waiver is a voluntary relinquishment of some right. But the mortgagee relinquishes nothing in such a case. The mortgager pays it as a matter of right; and it is not at the option of the mortgagee whether it shall be paid or not, until the right of redemption expires. A receipt of payment after that would be a waiver of the forfeiture; but before forfeiture the mortgager, by payment, acquires a right to a release, or a reconveyance, not on the ground of waiver, but of contract, and of law.

But though it is well settled in this State that upon payment after condition broken, the legal estate remains in the mortgagee until it is released, so that the mortgager cannot maintain a writ of entry against him; it is equally well settled that, in such case, the mortgagee, not being in possession, cannot maintain such an action against the mortgager. (*Hadlock v. Bulfinch*, 31 Maine, 247; *Williams v. Thurlow*, 31 Maine, 392.) The reason assigned for this is that, by our statutes, in all actions upon mortgages, there must be a conditional judgment; and, if the debt has been paid, so that there cannot be such judgment, the demandant cannot recover at all. (*Wade v. Howard*, 11 Pick. 289; *Webb v. Flanders*, 37 Maine, 175; *Gray v. Jenks*, 3 Mason, 520.) Where there is no provision of statute to prevent, as in an action of forcible entry and detainer, it has been held that a suit for possession may be maintained by the mortgagee, after payment. (*Howard v. Howard*, 3 Met. 548, 557.)

The mortgagee, after such payment, holds but a naked trust, without any interest. As in other like cases of holding in trust, he can derive no benefit from it, and can convey no title except as subject to it. And the estate cannot be taken for his debts, though it can be taken for the debts of the *cestui que trust*. As the mortgagee's title in such case is of no value, there can be no motive for transferring it to a third party; and therefore it is seldom done in this country. That it may be done would seem to admit of no doubt. (*Dudley v. Cadwell*, 19 Conn. 218.) Such a deed, says Wilde, J., in *Wade v. Howard*, before cited, conveys "the legal estate, or a satisfied mortgage; such an estate as is frequently purchased in England to be tacked to a subsequent mortgage." Numerous cases of this kind may be found cited in the English editions of Cruise, vol. 2, c. 5, which Mr. Greenleaf has omitted, because the doctrine of tacking mortgages does not prevail in the United States.

There is no difficulty in applying these principles to the case at bar. When the executions against Hanson were issued he had paid the mortgage debt, but the mortgage itself had not been discharged. If the payment had been before the condition had been broken, that would have revested the estate without any discharge; and there would have been nothing to seize on the execution. (*Grover v. Flye*, 5 Allen, 543.) But payment after breach of the condition had no such effect. His interest in the premises was clearly liable to be seized on the executions; and the only question is, how should the levies have been made—by a sale, or by an extent?

If, at the time of seizure upon the executions, there had been not only a payment of the mortgage debt, but a release of the mortgage, recorded in the registry of deeds, then there could have been no sale of an equity of redemption, though the mortgage was in force at the time of the attachment upon the writs. (*Foster v. Mellen*, 10 Mass. 421.) In *Pillsbury v. Smyth*, 25 Maine, 427, the report of the case does not show whether the discharge of the mortgage had been recorded. And we need not determine whether, if there is a release, but not on record, the officer may not proceed as if none had been made. For in this case no release had been made, either upon the record or otherwise.

By the R. S., c. 90, § 14, "when the amount due on a mortgage has been paid to the mortgagee, or person claiming under him, by the mortgager, or the person claiming under him, within three years" from proceedings for a foreclosure, "he may have a bill in equity for the redemption of the mortgaged premises, and compel the mortgagee, or person claiming under him, to release to him all his right and title therein." And, by c. 76, § 29, "rights of redeeming real estate mortgaged may be taken on execution and sold."

It was just such a right of redeeming a paid mortgage which Hanson owned when it was seized on the executions. The same title passed by the sale that would have passed by an extent. The defendant therefore conveyed a good title to the plaintiff; and the latter, having suffered no loss, is not entitled to recover.

Whether, if there had been no right of redemption in existence when the plaintiff purchased of the defendant, he could recover back the consideration paid, on the ground of a mutual mistake of fact, is a question which becomes immaterial. See the case of *Earle v. De Witt*, with the able dissenting opinion of Merrick, J., 6 Allen, 520.

Exceptions sustained. Verdict set aside.

WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

APPLETON, C. J., and CUTTING, J., concurred in sustaining the exceptions for another cause.¹

KORTRIGHT v. CADY.

COURT OF APPEALS OF NEW YORK, 1860.

(21 N. Y. 343.)

Appeal from the Supreme Court. Action to foreclose a mortgage.

The defendant Cady was a subsequent grantee of the equity of redemption. He averred in his answer, and proved on the trial, that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was, for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender. Cady did not in his answer allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good.

The plaintiff had the usual judgment of foreclosure, and for a sale of the mortgaged premises. Upon appeal by the defendant Cady,

¹ The opinion of Appleton, C. J., in which Cutting, J., concurred, is omitted.

this judgment was affirmed at General Term in the First District; whereupon he appealed to this Court.

COMSTOCK, Ch. J.¹ After the suit was commenced to foreclose the mortgage, Cady, who had become the owner of the land, tendered the amount due, with the costs, which being refused, he set up the tender in his answer, in bar of the further maintenance of the action. The only question in the case is, whether a tender, made after a mortgage is due, by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State, in the case of *Jackson v. Crafts*, 18 John. 110. Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity of a reconveyance by him to the mortgagor after the mortgage has been paid. When that is done, the mortgagee has no title remaining in him to convey, and consequently, by our laws, on payment of the money he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is, whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

Nearly twenty years after this decision was made, the same question again arose concurrently, or nearly so, both in the Court of Chancery and the Supreme Court. The case in each of those courts originated in the same transaction, which was this: In 1823, one Edwards mortgaged land in Buffalo to the Farmers' Fire Insurance and Loan Company in New York. The company foreclosed that mortgage in Chancery in 1833, and at the sale under the foreclosure Tibbetts, their president, purchased a portion of the lands for the benefit of the company, so that the company was deemed the real purchaser. In 1835 they entered into a written contract with W. T. and Isaac Merritt, whereby they agreed to sell to them the land so purchased, and the Merritts paid a part of the price agreed on. By a clause in the charter of the company, it was declared that when the corporation became the purchaser of any land mortgaged to them the mortgagor should have the right of redemption of such lands on payment of principal, interest, and costs, so long as the same should remain in the hands of the corporation unsold. After the company made the said contract of sale to the Merritts, Edwards, the mortgagor, claiming that the lands in question still re-

¹The order of the opinions has been changed.

mained in the hands of the company unsold, tendered to them the amount of the mortgage debt with interest and costs, and demanded a release or reconveyance of the premises. The tender and release being refused, he brought ejectment against the company in the Supreme Court. (*Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467.) The controversy in Chancery was upon a bill filed by the Merritts to enforce the specific performance of a contract with one Lambert for the exchange of the same lands for other real estate in the city of New York; and the question was, whether they could make title to the said lands in Buffalo. Before filing that bill, the heirs of Tibbetts had conveyed to the Merritts in pursuance of the contract of the company; but that conveyance was given after the above-mentioned tender. (*Merritt v. Lambert*, 7 Paige, 344.) The question of title in both of these controversies depended on two considerations: First, did the lands remain in the hands of the company unsold, notwithstanding the contract to sell them to the Merritts? Second, if so, then did the tender by the mortgagor discharge the lien of the mortgage?—it being, of course, conceded that, under the said clause in the charter, the right to pay off or redeem the mortgage existed notwithstanding the foreclosure and purchase by the company. The Chancellor was of opinion that the contract with the Merritts was in effect a sale to them, which cut off all the rights of the mortgagor; in other words, that, by reason of that sale having been made, the saving clause in the charter had no effect. He was also of opinion that if the right to redeem was still left in the mortgagor, a mere tender unaccepted did not discharge the lien.

In giving his views upon the last mentioned question, the Chancellor criticised the opinion of Judge Woodworth in *Jackson v. Crafts* (*supra*), for the reason that the English authorities which he referred to related to a tender on the day when the mortgage debt became due. (Bac. Abr., tit. Tender, F.; Co. Lit., 209 b, § 338; 20 Vinet, tit. Tender, N., § 4.) On this criticism I shall make one or two observations. By the ancient common law, a mortgage was a grant of land defeasible on the condition subsequent of paying the money at the exact time specified. (1 Powell on Mortgages, 4.) On failure to perform that condition the grant was absolute, and neither tender nor payment made afterwards could have the effect to revest the title. The specified time of payment was called the law day, because after default the legal rights of the mortgagor were gone. The estate became vested in the mortgagee absolutely, because the original grant was freed from the condition. "For these reasons," the Chancellor himself remarked, "it is, that the mortgagor, or his assigns, or subsequent incumbrancers upon the

mortgaged premises, are driven to a bill to redeem, where the mortgagee refuses to receive what is equitably due to him. But this could not be necessary," he added, "if a mere tender of the amount due after the mortgage has become forfeited would have the legal effect of discharging the mortgaged premises from the lien of the mortgage." It is a self-evident proposition, which the Chancellor need not have undertaken to prove, that when the law was that even payment after the law day would not discharge the mortgage, a mere tender could not have such an effect. He was probably quite correct in saying that the English authorities cited by Judge Woodworth referred to tender at the day, because those authorities were of a date when even payment after the day did not divest the estate or interest of the mortgagee. But Judge Woodworth and the eminent men who sat with him on the bench of the Supreme Court considered, what the learned Chancellor seems to have failed to notice, the fundamental change which the law of mortgage had undergone long before the decision in *Jackson v. Crafts* was pronounced. In this State, a mortgage had always been regarded as a mere security or pledge for the debt; and the rule had always been that payment at any time discharged the lien, so that no reconveyance of the estate was necessary. It seems to me, therefore, that the authorities cited by the Supreme Court, on the effect of tender, were extremely pertinent to the question, because they showed very conclusively that a tender at the law day had the same effect on the mortgage as a payment on that day. Underlying this particular proposition, of course, was the more general doctrine that when a certain effect must be given to a payment, a tender will have a like effect. This was what the Supreme Court undoubtedly meant, and the authorities cited simply showed the application of the principle to the law of mortgage. The principle itself, or its application, was not questioned by the Chancellor; but he did not consider, so far as appears, that the rule had become entirely settled, giving to a payment after the day and on the day precisely the same consequences. I think, therefore, with great respect for a jurist so learned and accurate, that he differed from the Supreme Court, and criticised its opinion, without due reflection upon the real ground of the decision.

I turn now to the controversy which arose concurrently in the Supreme Court, and directly presented the question for the second time in that court. (*Edwards v. The Farmers' Fire Insurance and Loan Company, supra.*) At the trial the Circuit Judge had ruled in favor of Edwards, the mortgagor, upon both the points above stated. That is to say, he held that, notwithstanding the contract of sale to the Merritts, the lands in question still remained in

the hands of the company unsold, and that the tender after the law day extinguished the lien of the mortgage, the foreclosure itself having no contrary effect, according to the express provision of the charter. The plaintiff had a verdict accordingly. A new trial was moved for in the Supreme Court and denied,—the opinion of the court being delivered by Mr. Justice Cowen, who examined both these questions, and especially the one now presented to us, at great length and with great ability. In the course of the discussion he also spoke of the provision in the charter as an extension of the law day; but to that consideration I think only small importance should be attached, for the charter only extended the “right of redemption,” in other words, the right to pay off the mortgage, leaving the effect of an unaccepted tender to depend, as it did before the foreclosure, upon general principles of law. If the concurrence of Chief Justice Nelson had been placed on this special and narrow ground, undoubtedly he would have so stated. Mr. Justice Bronson dissented from the conclusion; but whether on the ground that the executory sale to the Merritts had cut off all the rights of the mortgagor, or on the ground that a mere tender does not remove the lien of a mortgage, does not appear.

After a decision so authoritative as that of *Jackson v. Crafts*, and the lapse of nearly twenty years, there being in the intermediate time at least two distinct recognitions of the doctrine in the Supreme Court (5 Wend. 617; 11 *Id.* 538), this question might well have been regarded as at rest. It sprang, however, into a new existence under the opinion of the Chancellor; and although the Supreme Court, with a new bench of judges, reaffirmed its position after a most elaborate and searching examination, the subject was perhaps a suitable one for final adjudication in the tribunal of last resort. The action of ejectment was accordingly carried to the Court for the Correction of Errors, which affirmed the judgment of the Supreme Court. (*Farmers' Fire Insurance and Loan Company v. Edwards*, 26 Wend. 541.) The cause was most fully argued by some of the ablest gentlemen at the bar, and the decision of the court was pronounced beyond all possibility of cavil on the very point now in controversy. The Chancellor, who was a member of the court, and could and did take part in the decision, was for reversal on two grounds, which he stated: 1. That the written contract to sell the premises to the Merritts was a sale within the meaning of the saving clause in the charter of the company. After that contract was made, and a part of the purchase money paid, he thought the lands no longer remained in the hands of the company unsold, so as to authorize the mortgagor to redeem. 2. On the ground that a tender of the mortgage money after default in pay-

ment at the day could not in any case have the effect to extinguish the lien. With the Chancellor concurred seven of the Senators. Senator Verplanck delivered an opinion in favor of affirmance, discussing on the other side the same questions and no others. He made no attempt to sustain the decision on the ground that the law day of the mortgage was extended by the charter in any sense different from a mere continuation of the right to redeem or pay off the debt after the original default and after the foreclosure and sale. No member of the court, on either side of the general question, so much as mentioned that ground of decision; and most manifestly the right to redeem given by the charter, notwithstanding a foreclosure and purchase by the company, could not have, and was not designed to have, the effect of enlarging the contract in respect to the specified time of paying the debt. With Mr. Verplanck concurred the President of the Senate and a majority of the Senators. We are bound to say that the judgment was pronounced on the two propositions discussed in the respective opinions, and it necessarily affirmed both of those propositions. There is no other conceivable explanation to the judgment, unless we say that a judicial foreclosure and sale created a new law day of indefinite continuance, after the one appointed in the contract had long since passed; and this we cannot say, because such a position was in itself wholly untenable, and was not even alluded to by any member of the court. No one who will read the case with a little attention can fail to be satisfied that it was a decision most deliberately pronounced upon the very question now to be determined.¹ . . .

Such being, as I think, the clear result of the authorities, a renewed discussion of the question may seem to be unnecessary. I cannot help saying, however, that a decision by this court in opposition to the rule laid down in the cases referred to would introduce into the law of mortgage an inconsistency too plain to escape observation. In the early history of that law the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord Redesdale observed (Mitf. 428): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law

¹ Here follows an examination of the case of *Arnot v. Post*, 6 Hill, 65, which is omitted.

of the next." Such, preëminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity respecting the rights of mortgagor and mortgagee have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. In *Martin v. Moulin*, 2 Burr. 978, decided by the English King's Bench in 1760, it was held that whatever words in a will would carry the money due upon a mortgage would carry the interest in the land. Lord Mansfield said: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it though the debt were forgiven only by parol." So, in *The King v. St. Michaels*, Doug. 632, it was said by the same judge that "a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security." To the same effect is *The King v. Edington*, 1 East. 288, and such is the uniform tenor of the English authorities. (See 6 Conn. 159.)

In this State, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This proposition, in its full length and breadth, was determined in *Rungan v. Mersereau*, 11 Johns. 534, where the question arose in the most direct manner whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sued in trespass for cutting timber, the defendant justifying under a license from the mortgagee. It was held that the action was maintainable, the decision being placed explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things; that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or curtesy; that it passes by a parol transfer, and by any transfer of the debt; and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (3 Johns. Cas. 329; 1 J. R. 590; 4 Ll. 42; 7 Id.

278; 15 *Id.* 319; 6 *Id.* 290; 2 Paige, 68, 586; Wend. 603; 2 Barb. Ch. 119.)

But it has been said that the mortgagee could maintain ejectment against the mortgagor until our Revised Statutes abolished that remedy in such a case, and that even since those statutes the mortgagee, being in possession, may retain it until the debt is paid. All this is true; but it presents no anomaly or inconsistency in the law. The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (6 Conn. 163.) Such a right is but the incident of the debt, and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession; and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary right; and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 Bl. 199, 200.) When the Legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge: but when its object is accomplished it is neither just nor lawful for an instant longer.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from

words rather than things. So we have the terms "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate the day after a default is exactly what it was the day before. Controversies like the present would cease to arise if the mere terms of the law were no longer confounded with its principles.

The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. (3 Johns. Cas. 243; 12 J. R. 274; 6 Wend. 22; 6 Cow. 728; *Cogg's v. Bernard*, 2 Lord Ray. R. 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of

losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed, and a new trial granted.

DAVIES, J. [after a careful examination of the earlier authorities, proceeded as follows]: The rule in England was therefore ancient and well settled, that payment on the law day extinguished the interest of the mortgagee in the lands mortgaged; and tender and refusal at the same time produced the same result. But payment after, and acceptance, did not revest the estate in the mortgagor without a reconveyance from the mortgagee; and a tender and refusal would, of course, not produce that result. The mortgagor's only remedy was to avail himself of the benefit of the rule in equity, and file his bill to redeem. The only question presented for our consideration in this case is, whether a tender of the sum due on a mortgage, after the day appointed by it for its payment, extinguishes the lien of the mortgage on the land covered by it. We have seen that by the common law such tender and refusal upon the law day extinguishes the lien of the mortgage, though the debt remains. In this State the law is well settled that a mortgage is a mere security or pledge of the land covered by it for the money borrowed or owing, and referred to in it, and that the mortgagor remains the owner of the estate mortgaged, and may maintain trespass as against even the mortgagee. (*Runyan v. Mersereau*, 11 John. 534.) The debt, in the eye of the law, thus becomes the principal, and the landed security merely appurtenant and secondary; and the rights of the parties must be governed by those principles of law applicable to analogous cases. Acceptance of payment of the amount due on a mortgage, at any time before foreclosure, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. (*Kemble v. Wallis*, 10 Wend. 374.) This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without

releasing his prior debt. (*Coit v. Houston*, 3 John. Ca. 243.) In *Hunter v. Le Conte*, 6 Cow. 728, the Supreme Court held that a tender of rent takes away the right to distrain till a subsequent demand and refusal; but it does not take away the right to sue for the rent as for a debt. It only saves the interest and costs. And that a tender of rent makes a distress wrongful, though the tender be not made till after the rent day. It will readily be perceived that the principle of this case bears directly upon the question now under consideration; and it is not perceived, if it be sound, why a tender and refusal of the amount due on a mortgage does not extinguish its lien equally with a tender of rent and refusal, which, as we have seen, extinguishes the right of distress. But a still closer analogy to the present question is presented by the law of tender, as to the lien on goods pledged. Lord Ch. J. Holt, in his opinion in the celebrated case of *Coggs v. Bernard*, 2 Lord Ray. 909, speaking of the fourth class of bailments, says: "If the money for which the goods are pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined." So also Comyn: "By tender of the money, the property in the goods is determined, and the pledge ought to be returned. But if the pawnee refuse to restore the pledge upon tender, trover lies against him." (Comyn's Dig. tit. Mortg., A, and cases there cited.) Holding, as we do, therefore, in this State that the land mortgaged is but a security for the debt due to the mortgagee, in other words, a pledge to him to secure its payment, it is difficult to see why the principles enunciated and well settled in reference to the pledge of personal property do not apply, and why a tender and refusal at any time of the full amount of the debt due does not extinguish the lien of the mortgagee, or pledgee, in the one case as it clearly does in the other.

But I think we are not left at liberty to settle this case on principle, but are to regard it as authoritatively disposed of by the courts of this State. A very careful examination of the decisions has brought my mind to the conviction, contrary to my first impression, that we should regard the question now presented as not open to further discussion. I shall recur to the cases in which this question has arisen; and I think an examination of them will lead to the same conclusions to which I have arrived.¹ . . .

It is not perceived how the mortgagee is to be embarrassed, or his security impaired, by the adoption of this rule, as seems to be supposed by the Chancellor in *Edwards v. Farmers' Loan Company*,

¹ The examination of the authorities is omitted.

26 Wend. 552. If the mortgagor does not tender the full amount due, the lien of the mortgage is not extinguished. The mortgagee runs no risk in accepting the tender. If it is the full amount due, his mortgage lien is extinguished and his debt is paid. This is all he has a right to demand or expect, and all he can in any contingency obtain. His acceptance of the money tendered, if inadequate and less than the amount actually due, only extinguishes the lien *pro tanto*, and the mortgage remains intact for the residue. A much greater hardship might be imposed, and serious injury be produced, by holding that the mortgagor cannot extinguish the lien of the mortgage by a tender of the full amount due. It has never occurred to any judge to argue that a pawnee was in great peril, and in danger of losing the benefit of his pawn, by the enforcement of the well settled rule that a tender of the amount of the loan and interest, and refusal, extinguished the lien on the pawn. Littleton well says, that it shall be accounted a man's own folly that he refused the money when a lawful tender of it was made to him. The only effect upon the rights of the mortgagee is, that the land or thing pledged is released from the lien, but the debt remaineth.

The only remaining question to be considered is, whether the tender in this case was well made, it not being followed with the allegation of *tout temps prist*, and the money not having been brought into court. It will be seen, by reference to the authorities, that these are not required when the tender has only the effect of extinguishing the lien, and does not operate to discharge the debt or sum owing. In the latter case the averment of *tout temps prist* followed up by bringing the money into court, is essential to a good plea of tender. (*Hume v. Peploe*, 8 East, 168; *Giles v. Hartis*, 1 Lord Ray. 254.) But if a man make a bond for the payment of a loan of money, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor tender the lesser sum at the day, and the obligee refuse it, he shall never have any remedy by law to recover it, because it is no parcel of the sum contained in the obligation. And in this case, in pleading of the tender and refusal, the party shall not be driven to plead that he is yet ready to pay the same, or to render it in court. (Co. Lit., note to § 335.) The same principle was held by the Supreme Court of this State in *Hunter v. Le Conte*, 6 Cow. 728, and cases there cited.

No question in reference to the taxes arises in this cause, upon the facts found by the referee. The referee found in favor of the appellants upon the question relating to them; and to his finding in that respect the plaintiff took no exception. It is not, therefore, to be reviewed in this court.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

SELDEN, CLERKE, WRIGHT, BACON, and DENIO, Js., concurred; the latter putting his concurrence on the ground that the question was so far determined by authority in this State, that it would now be indiscreet to reëxamine it in the light of reason and the analogies of the law.

WELLES, J. (Dissenting.) The only question involved in the case is, whether the tender made by the defendant Cady, under the circumstances, was effectual to extricate the premises in question from the lien created by the mortgage of Blunt to Miller. This tender was made after the day provided in the bond and mortgage for the payment of the money, which is called the law day. If the sum tendered was sufficient in amount, and was made to the proper person, the question is reduced to the single point whether the lien of a mortgage is, *ipso facto*, discharged by a tender of the amount due made after the law day; because, if it is, there is no necessity, in an answer setting it up, of the allegation of *tout temps prist*, or of any evidence to show that the tender has been kept good, neither of which is contained in the present case; but the defendant relies solely upon the fact of a tender and refusal as equivalent to payment, for the purpose of extinguishing the lien of the mortgage.

If a tender has the effect in any case to release the lien, it produces that effect the moment it is made, whether accepted or refused. If accepted, it is a payment; if refused, it is the folly of the holder of the mortgage, and the lien is gone and cannot be restored by his subsequent change of mind and offer to receive the money tendered. This must be so; otherwise, the tender would not discharge the lien. It is quite different from the case of an ordinary plea of tender at common law, for the purpose of stopping interest and preventing costs, in an action for money due on contract, in which the plea must contain the averment of *tout temps prist*, and where a replication of a subsequent demand, before suit, of the money tendered, and refusal by the defendant, would be a good answer to the plea.

In the case of a mortgage which is collateral to the debt, it is agreed that a tender may be made by the person owning the equity of redemption, which will extinguish the lien of the mortgage forever, without affecting the debt. The primary object of a foreclosure suit is to enforce the lien, and if that is met by a sufficient tender, the cause of action is gone and cannot be restored by a subsequent demand and refusal. It is important, therefore, to consider whether the tender in the present case, being made after the

law day, if good in other respects, had the effect to discharge the lien of the mortgage.¹ . . .

My own opinion is, after a careful examination of the cases, that the weight of authority is in favor of the rule as it existed at the common law. If that rule has not been abrogated or modified, all will admit that it is the plain duty of the courts to follow and enforce it. Clearly there is no *stare decisis* in our way. It is of importance that the rule be definitely settled, and its boundaries defined. Before we hold a rule different from what we find it settled by the common law, we should require evidence that the rule has been changed by competent authority, either expressly or by necessary implication.

This evidence, the advocates of the change of the rule claim, is found in the changed character of a mortgage upon land, in consequence of various legislative enactments. We are told that when the rule of the common law in question was adopted, a mortgage conveyed a conditional estate in the premises, which entitled the mortgagee to possession, and upon which he could maintain ejectment; and that a mortgage does not now pass any estate in the land, but is merely the creation of a specific lien as security for the payment of a debt or the performance of a duty; and that the statute has taken away the right of the mortgagee to maintain ejectment. All this is true; and doubtless other shades of difference may be found between the legal effect of a mortgage at common law and as it now exists. But they will be found to relate to the remedy, or to consist in collateral or incidental circumstances. Mortgages are substantially what they always were. The fact that they are not now regarded as transferring the freehold, but are merely specific liens, is altogether theoretical and ideal, so far as respects the question under consideration. The great object of these instruments is the same now as it always was—that of security for the payment of money or the performance of a duty. A mortgagee in possession is now, as always heretofore, accountable for rents and profits, and he may still defend his possession with the mortgage the same as ever. I know of no difference between the right of the mortgagor, or the person owning the equity of redemption, to redeem the premises from the lien of the mortgage, as that right now exists, and as it existed in the time of Coke or Littleton. That right is governed now by substantially the same rules as then.

The rule contended for by the plaintiff is reasonable, convenient and just. In the first place, the parties to the mortgage have, by agreement, fixed upon the time of payment, and if the mortgagor

¹ The learned judge then re-examines the New York authorities. This portion of the opinion is omitted.

fulfills his agreement by paying on the day appointed, or tendering payment on that day, the lien is discharged. The parties are then to be ready, the mortgagor to pay, and the mortgagee to receive. If the former performs his duty, or tenders performance, and the latter refuses, his lien is gone forever; he has no excuse for his folly, and is entitled to no consideration for the loss of his lien. On the law day each party is presumed to know exactly what his duty is, and the amount the mortgagor is bound to pay and the mortgagee entitled to receive.

If the mortgagor allows the law day to pass without payment or tender, he then is a defaulter. If he can discharge the lien by a tender of payment the next day, there is no reason why he may not do the same by a tender after the lapse of one year or of ten years.

Suppose the mortgagee goes into possession under the mortgage, by consent of the mortgagor, immediately upon default of payment, and the latter takes no steps towards payment for years after; what amount shall he tender when he gets ready for payment? what abatement from the principal and interest shall be made for mesne profits? Shall the defaulting mortgagor be permitted to select his own time, and then make a tender of such an amount as he shall deem proper, and the mortgagee be bound to accept it in full, at the peril of losing his lien forever?

Suppose again the case of a defaulting mortgagor, who claims to have made partial payments, or to be entitled to a set-off, about which he and the mortgagee in good faith differ: according to the rule claimed by the defendant, he must accept in full the amount tendered at the peril of losing his lien, provided, upon a litigation, it shall be adjudged that the tender was sufficient in amount. It seems to me that the old rule is the only just and wholesome one that can be recognized. It is quite as favorable to the mortgagor as he can in reason ask. If he makes a sufficient tender after the day and before an action is brought to foreclose the mortgage, let him keep the tender good, and, when he is sued, let him set it up as a defence, bring the money into court and offer payment as in other cases, and the court will in such a case decree the mortgage satisfied and discharged, and adjudge costs against the plaintiff. Or if for any reason the mortgagor, or the person whose duty or interest it may be to have the lien discharged, does not wish to wait the mortgagee's time for foreclosing, let him make his tender and keep it good, and then bring his action to redeem, alleging the tender and offering to pay; and if, upon the trial, it is found that his tender was sufficient and the plaintiff was ready to pay, the court would give him all the relief which equity and justice required. In all

these cases the mortgagee would have the right to have the disputed questions adjudicated without losing his lien for the amount in equity and justice due to him.

The rule contended for by the defendant would, in many cases, operate as a bounty to negligent and defaulting debtors, and mortgagees would, under its workings, be induced to purchase their peace at an unjust sacrifice.

For the foregoing reasons, I am of the opinion that the rule of Littleton, as expounded by Coke, and as, all now admit, was the rule of the common law in relation to the effect of a tender after the law day, is still the law of this State; and as the tender in this case has not been kept good, and the defendant's answer contains no offer of payment, and the facts found by the court before whom the cause was tried do not show that the tender has in any sense been kept good, or that the defendant was ready to pay, &c., I think that he can have no benefit by reason of it; and that the judgment should be affirmed, with costs.

*Judgment reversed.*¹

SHIELDS v. LOZEAR.

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1869.

(34 N. J. L. 496.)

In ejectment. Error to the Supreme Court.

This was an action of ejectment tried before the Chief Justice at the Warren Circuit (a trial by jury having been waived by the parties), to recover the possession of a tract of land situate in said county. The action was commenced on the 13th of June, 1869, and the plaintiff's right of possession was alleged to have accrued on the 1st day of April, 1869. The plaintiff in error (who was the plaintiff below) produced and offered in evidence a deed of conveyance of the premises, made to him by the defendant and wife, bearing date on the 9th of April, 1867.

¹ *Caruthers v. Humphrey*, 12 Mich. 270 (1864), *Potts v. Plaisted*, 30 Mich. 149 (1874), *Storey v. Kewson*, 55 Ind. 397 (1876), *accord.* So where mortgagee evades tender: *Ferguson v. Popp*, 42 Mich. 115 (1879), *McClellan v. Coffin*, 93 Ind. 456 (1883). And see *Breitenbach v. Turner*, 18 Wis. 140 (1864), and *Mankel v. Belscamper*, 84 Wis. 218 (1893), *semble, accord.* But the authorities generally are *contra*: *Currier v. Gale*, 9 Allen (Mass.) 522 (1865); *Perre v. Castro*, 14 Cal. 519 (1860); *Crain v. McGoon*, 86 Ill. 431 (1877); *Matthews v. Lindsay*, 20 Fla. 962 (1884).

The defendant then offered in evidence a mortgage made and executed to him by the plaintiff on the same premises, bearing date April 1st, 1867, together with the bond mentioned in and secured by said mortgage, conditioned for the payment of the sum of \$4,000 on or before the 1st of April, 1868, with interest from date. The plaintiff then offered in evidence a lease for the same premises, made and executed by him to the defendant, bearing date on the 9th day of April, 1867, for a term ending on the 1st day of April, 1868, in and by which said lease the defendant covenanted to quit and surrender up the premises to the plaintiff at the expiration of the said term, and proved that the rent agreed on was the interest of the mortgage money, and taxes and water rates. It was also proved and found as a fact in the cause, that a legal tender of the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the first day of April, 1868, and before the commencement of this action, which tender the defendant refused to accept.

The evidence being closed, the plaintiff, by his counsel, asked the court to find and to give judgment that the plaintiff was entitled to have possession of the said premises on the 1st of April, 1868, by virtue of the said lease, and that said lease required the said defendant to deliver possession of said premises to the said plaintiff, which finding and judgment the court refused to make and give, and thereupon the plaintiff prayed an exception to such refusal, and that his exception might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. 8.]

The . . . plaintiff . . . asked the court to find, as a fact, that a legal tender of all the money due and owing on the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action, and, upon that fact, to give judgment for the plaintiff, on the ground that said tender extinguished and terminated any and all right the said defendant might have previously had to hold possession of the said land, by virtue of said mortgage. And the plaintiff, by his counsel, also asked the court, in case the plaintiff should be in error as to his asking in regard to the effect of the said lease, to permit an amendment of the declaration to be made, so as to state that the plaintiff's right to the possession accrued at the time when the said tender was made.

The court did find, as a fact, that a legal tender of all the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action; but the court refused to adjudge that said tender extinguished and terminated the right of the said de-

defendant to hold possession of the said land, by virtue of said mortgage, and did adjudge that said tender having been made after the day named in the said bond for the payment thereof, did not extinguish or terminate the right of the said defendant to hold possession of the said land, and that the said defendant was and is entitled to hold possession of said land, by virtue of said mortgage, notwithstanding the making of said tender, to which refusal and judgment of the court the plaintiff, by his counsel, excepted, and he prayed that his exception might be sealed, and it is sealed accordingly.

M. BEASLEY, C. J. [L. S.]

The opinion of the court was delivered by

DEPUE, J. The bills of exception sealed at the trial raise two questions: First. Whether the defendant, being the tenant of premises under the plaintiff, could, at the expiration of his lease, make title under his mortgage without first yielding and surrendering the possession to the plaintiff. And, second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.¹ . . .

The extinguishment of the lien of the mortgage by the unaccepted tender of the mortgage money after the day named in the condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as subject to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any re-conveyance, by the simple operation of the condition. A tender at the time and place and in the manner prescribed in the instrument itself was equivalent to performance, and operated to determine the estate of the mortgagee, and revest it in the mortgagor. (Lit. § 335; Co. Lit. 207, a.; 4 Kent, 193; Coote on Mortgages, 6; *Merritt v. Lambert*, 7 Paige, 344.) But when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a re-

¹ The opinion on the first point is omitted.

conveyance was necessary to restore him to his original estate. (Lit. § 332; 2 Black. Com. 158; Coote on Mortgages, 9.) So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer that if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. (Williams on Real Prop. 333.) The rigor of this rule was somewhat abated by the statute of 7 George II., ch. 20 (1 Evans' Statutes 243, re-enacted in this State December 3d, 1794, Nix. Dig., 4th ed., 608), which permitted a mortgagor, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or re-convey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a re-conveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a re-conveyance on equitable terms.

In the United States, the prevailing doctrine in courts of law as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. (2 Greenl. Cruise, 91, note 1; 4 Kent, 153.) In fact, the latter conclusion will necessarily follow whenever the mortgage is regarded not as a common law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt. (*Per* Chief Justice Green, in *Osborne v. Tunnis*, 1 Dutcher, 654; *per* Justice Southard, in *Montgomery v. Bryere*, 1 South. 279, whose dissenting opinion in the Supreme Court was adopted in the Court of Errors

in reversing the judgment of the Supreme Court. 2 South. 865.) Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice Kinsey, speaking of payment after the law-day, says: "When the debt is discharged according to law the mortgagee has the legal seisin in trust for the mortgagor, and the court will never permit the trustee or those claiming under him to set up this legal estate in him or them, to defeat the possession of the *cestui que trust*. This principle is settled in *Armstrong v. Peirce*, 3 Burr. 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the *cestui que trust* could have compelled a re-conveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7th, 1799 (Rev. Laws, 463; Nix. Dig., 4th ed., 611, sec 11) which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance where the question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named as performance of the condition, and by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 J. R. 110, on a misapprehension of a passage from Littleton. (Lit. §§ 335, 338.) It was denied by the Chancellor in *Merritt v. Lambert*, 7 Paige, 344, and re-affirmed in the Supreme Court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the Court of Errors, in the same case on error, 26 Wend. 541; and by the Supreme Court in *Arnot v. Post*, 6 Hill, 65; and again denied by the Court of Errors in reversing the last-mentioned case. (*Post v. Arnot*, 2 Denio, 344.) Finally, in *Kortright v. Cady*, 21 N. Y. 343, the question was set at rest in the courts of that State by re-affirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that State that a tender of the money due upon a mortgage at any time before foreclosure discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other State. In Massachusetts

the decisions have been to the contrary. (*Maynard v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen, 522.) In an early case in New Hampshire (*Sweett v. Horn*, 1 New Hamp. 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, &c., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. (*Bailey v. Metcalf*, 6 New Hamp. 156.) It may with safety be said that the doctrine of the New York courts, originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that State, is without the support of any judicial tribunal in this country, and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named determines the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money-bond, before the statute 4 Anne, ch. 16, § 12, reenacted in this State (Nix. Dig. 631, § 9), payment after the day would not be pleaded without an acquittance by deed. (2 Saund. 48, c, note 1; *Rosencrantz v. Durling*, 5 Dutcher, 191.) The statute only applies to payments actually made, and a tender after the day cannot be pleaded. (2 Saund. 48, b, note i.) And if the tender is made on the day, it can only be made available by plea, accompanied by payment into court. (Co. Lit. 207, a.)

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which by the rules of pleading and established principles of law the court must deny in an action on the bond, which is the immediate evidence of the debt. If the

form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. (6 Bac. Abr. 456, title Tender, &c., F.) If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed and the feoffor may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. (Co. Lit. 209, a.) The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee, with all the rights incident to it. (*Grugeon v. Gerrard*, 4 Younge & Coll., Exch., 119-128.)

When a court of law undertakes to deal with this equitable estate it must do so upon principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seisin of the mortgagee is not a mere formal title, and no trust will be

raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

It was stated on the argument that the money due on the mortgage was brought into court at the trial. That fact does not appear in the bills of exceptions. It is not necessary, therefore, to decide whether a court of law could enforce redemption in cases within the equity, though not within the strict letter of the statute. The English courts of law have given a strict construction to the corresponding statute of 7 George II., ch. 20, and have held the circumstances of the litigation mentioned in the preamble and in the statute to be jurisdictional facts, which the court is not at liberty to disregard. (*Doe v. Clifton*, 4 Ad. & El. 809; *Good-title v. No-title*, 11 Moore, 491; *Sutton v. Rawlings*, 3 Exch. 407.) The statute should be strictly construed, and is not applicable to any case in which the mortgagor is himself the actor. It was designed to apply only in certain cases mentioned in its preamble and in the introductory words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgagee has obtained possession under the mortgage. (*Yates v. Humbly*, 2 Atk. 363; *Green v. Green*, 2 Simons, 399, 406; Bacon's Ordinances in Chancery, 9; *Valentine v. Teller*, Hopk. C. R. 422; *Devaneone v. Devaneone*, 1 Edw. C. R. 272; *Kershaw v. Thompson*, 4 Johns. C. R. 609; *Schenck v. Conover*, 2 Beas. 221; *Fackler v. Worth*, *Id.*, 395; *Thomas v. De Baum*, 1 McCarter, 37; 2 Dan. Chan. Prac. 1280.)

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

TUTHILL v. MORRIS.

COURT OF APPEALS OF NEW YORK, 1880.

(81 N. Y. 94.)

Appeal from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon and to have the same adjudged to be extinguished and to require defendant to cancel the same of record, on the ground that the amount of the mortgages was duly tendered and refused.

The mortgages were executed by plaintiff. The mortgagees commenced proceedings to foreclose the same by advertisement under the statute. Pending the proceedings they assigned the mortgages to defendant. Defendant requested one Steers, an attorney, to attend the sale for him. The circumstances and the nature of the employment, together with the occurrences out of which the alleged cause of action accrued, are set forth in the opinion.

RAPALLO, J. The uncontroverted evidence shows that Mr. Steers, to whom the tender relied upon by the plaintiff was made, was not the attorney in the foreclosure proceedings nor connected with such attorney, nor the agent of Mr. Morris, except for the specific purpose for which he was employed; that his first and only connection with Mr. Morris or the foreclosure was that he was requested, on behalf of Mr. Morris, to go to the place of sale and engage an auctioneer, and to attend the sale and see that it was properly conducted. It may also be inferred from the testimony that he was instructed that the sale should be for cash. It is conceded by the respondent's points that Mr. Steers had no express authority to receive a tender and that none was thought of. Mr. Steers did not know nor was he informed of the amount due for principal, interest, or costs, beyond such information as was afforded by the notice of sale, nor does it appear that he had any means of ascertaining the amount of the costs. He was not empowered to receive the purchase money, for this would be payable only on the execution of the deed by the mortgagee. When he arrived at the place appointed for the sale he was presented with a summons, complaint and order of injunction in an action by the plain-

tiff against Mr. Morris, but declined to receive or admit service thereof on behalf of Mr. Morris, on the ground that he was not his attorney. The injunction order was then read to him. It ordered that the sale be upon the terms, among others, that not more than 10 per cent. of the amount bid be paid down. He stated, as testified to by the plaintiff's attorney, that he was instructed to sell for cash, and said that if he could not do that he should adjourn the sale, and accordingly instructed the auctioneer to adjourn the sale for thirty days. After he had announced his intention to adjourn the sale, but before he had instructed the auctioneer, and as he was about doing so, the alleged tender was made by Mr. Tuthill, one of the plaintiff's attorneys, in the following manner, as testified to by Mr. Tuthill: Mr. Tuthill testifies that he tendered to Mr. Steers a quantity of greenbacks, amounting, in fact, to \$6,300, and said to Mr. Steers that he tendered the money in behalf of the plaintiff for the whole amount due. That he did not state how much money there was, but tendered it, and said to Mr. Steers: "I want to pay the whole amount if you will let me know how much it is," and Steers replied that he did not know. Witness then said: "Will you take this money?" and he said he would not, and asked what witness wanted to pay for, and witness said that he wanted to pay for the notes, interest and costs. Immediately after this conversation, the auctioneer, under the instruction of Mr. Steers, announced the adjournment of the sale for thirty days.

Mr. Steers testified that in declining to receive the money he stated that he was not authorized and that the sale was adjourned.

We perceive nothing in the course pursued by Mr. Steers indicating any purpose to oppress or take any undue advantage of the plaintiff. By the adjournment of the sale the plaintiff was relieved of all immediate pressure, and ample time was afforded, if he in good faith desired to pay off the mortgages, to seek the proper party and have the amount of interest and costs ascertained. It is apparent that the tender made was a complete surprise, and that even if Mr. Steers had authority to receive payment of the mortgages he was not in a situation to do so at that time or place. It is by no means clear that a person, not the attorney in the proceeding, but merely casually employed to superintend a mortgage sale and see that it is properly conducted, is by such employment authorized to receive the principal of the mortgage, but, irrespective of that point, when he announces that he is ignorant of the amount due for principal, interest and costs, and it is evident that he has not the means of information at hand as to the exact amount, it would be in the highest degree unreasonable to

hold that a person thus situated is bound to take the responsibility of accepting or refusing a tender, and that his refusal discharges the lien of the mortgage. Insisting upon the immediate acceptance of a tender under such circumstances, and when the sale is about to be adjourned, indicates rather a design on the part of the mortgagor to take an unfair advantage of the mortgagee than to relieve himself from oppression.

Furthermore, there is no evidence in the case showing that the sum tendered was the full amount of principal, interest and costs. The sum tendered is said to have been \$6,300. The amount of principal and interest, according to the notice of sale, was \$6,150 and upwards. What was the amount of the costs in no manner appears in the case. To this point it is answered that Mr. Steers did not object that the amount tendered was insufficient, and that the plaintiff was ready to pay whatever amount was due. But Mr. Steers did state that he was ignorant of the amount, and he did not occupy such a relation to the case that it could be presumed that he knew or that it was his duty to know the precise amount.

Neither does it appear that any specific amount was tendered. The plaintiff's witness, Mr. Tuthill, exhibited a quantity of bills, but he admits that he did not name the amount, though he asked Mr. Steers to count them, and, taking the whole evidence, it is not clear that Mr. Tuthill offered to pay the whole amount he had in his hand, if it exceeded the amount due. When asked what he wanted to pay, he replied, "the notes, interest and costs." He had previously said that he wanted to pay the whole amount if Mr. Steers would let him know how much it was, and Steers had told him he did not know. The fair construction of this testimony is that he desired to pay the amount due only, and before paying desired to be informed of the amount, but that the person to whom he applied had not the means of giving the information.

We are of opinion that the plaintiff failed to make out a tender to the defendant and a refusal which discharged the lien of the mortgage. In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made and deliberately and intentionally refused by the mortgagee, or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender.

But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been

duly made of the full amount due it will discharge the lien and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law, and could not be enforced even in equity, does not entitle a party to come into a court of equity and have it decreed to be surrendered or extinguished without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity, without payment of the debt with legal interest, until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but on the contrary recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.

We are of opinion, however, as already stated, that no sufficient tender was shown, and that on both grounds the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

* *Werner v. Tuck*, 127 N. Y. 217 (1891), *Nelson v. Loder*, 132 N. Y. 288 (1892), *Coches v. Marble*, 37 Mich. 158 (1877), *accord*. But see *Magnan v. Moors*, 9 Mich. 9 (1860) and *McClellan v. Coffin*, 93 Ind. 436 (1883), *contra*.

CHAPTER V. (*continued.*)

SECTION II. OTHER DISCHARGE OF DEBT.

SPEARS v. HARTLY.

COURT OF COMMON PLEAS, 1800.

(3 *Espinasse*, 81.)

This was an action of trover, for a log of mahogany.

The defendant was a wharfinger, and claimed a lien on it, as well for the wharfage as for the balance of a general account, which balance was due in the year 1790; under which lien he justified a right to retain it.

Best, Serjeant, for the defendant, contended that, admitting the defendant might claim a lien for the wharfage due on a particular article, he was not entitled to such lien for the balance of a general account.

Lord ELDON, referring to the case of *Naylor v. Mangles*, *ante*. 1 vol. 109, said: This point has been ruled by Lord Kenyon, that a wharfinger has a lien for the balance of a general account, and considered as a point completely at rest; I shall, therefore, hold it as the settled law on the subject that he has such a lien as is claimed in the present case.

Best then contended that it appeared that the balance which the defendant claimed to be due, and under which he entitled himself to a lien, had accrued in the year 1790, and so was barred by the statute of limitations; the debt being therefore discharged by operation of law, the defendant could not be entitled to any lien by virtue of it.

LORD ELDON: If what has been stated by the defendant's counsel be law, that the debt is discharged by the operation of the statute of limitations, no lien could be obtained by reason of it; but the debt was not discharged; it was the remedy only. I am of opinion that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand

when the goods came to his possession; and I am of opinion he may enforce it by the lien which the law has given him for his general balance.

Verdict for the defendant.

DAVIS v. BATTINE.

HIGH COURT OF CHANCERY, 1830.

(2 *Russ. & Myl.* 76.)

A creditor who had a mortgage security for his debt had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the Insolvent Act.

On an exception to the Master's report, the question was raised whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

Mr. *Treslove* and Mr. *Martin*, in support of the exception.—In *Barnaby's Case*, 1 Strange, 653, it was held that a creditor who had taken the body of his debtor in execution could not be a petitioning creditor to sustain a commission of bankrupt, because the body of the debtor being in execution was, in point of law, a satisfaction of the debt. If the debt be absolutely satisfied, how can the creditor claim further satisfaction? No instance can be adduced in which a mortgagee having taken the body of the mortgagor in execution for the mortgage debt, has gone on to foreclose. The principle of the court is, that a mortgagee, though he may have recourse to all his remedies, cannot have a double satisfaction. If he forecloses and sells the estate, he will not be permitted afterwards to sue on the covenant for the deficiency. (*Perry v. Barker*, 13 Ves. 428; *Tooke v. Hartley*, 2 Bro. C. C. 125.)

Mr. *Wilbraham*, *contra*.

The Master of the Rolls [SIR JOURN LEACH] said he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he overruled the exception.

BRINCKERHOFF v. LANSING.

COURT OF CHANCERY OF NEW YORK, 1819.

(4 *Johns. Ch.* 65.)

Bill filed February 4th, 1812, by John Brinckerhoff, Nathan Morey, and Aaron Wilcox against Levinus Lansing, Otis Bates, and James Adams to restrain defendants from selling certain premises in Lansingburgh under a *fi. fa.* levied thereon by defendant Lansing, or under a power of sale contained in a mortgage, executed September 2, 1802, by defendant Bates to said Lansing, to secure the latter against loss on a note endorsed by him for Bates. The plaintiffs claim title to the property in question, and allege that on April 3d, 1806, a judgment by confession was entered up against defendant Bates in favor of defendant Lansing to indemnify him as such endorser, and that the note or notes, to secure which the mortgage was given, were afterwards discharged. The other material facts are given in the opinion.¹

THE CHANCELLOR [KENT]: The claims of the three plaintiffs are entirely separate from each other, and rest on distinct grounds.

1. The plaintiff Wilcox claims as a purchaser under the defendant Bates, and seeks to be relieved from the operation of a judgment of 1806, against Bates, in favor of the defendant Lansing. The counsel for the defendant Lansing admitted at the hearing that the judgment complained of was satisfied; consequently, the plaintiff Wilcox is entitled to the relief sought by the bill, and to have the defendant Lansing perpetually enjoined from any proceeding upon that judgment. The plaintiff Brinckerhoff also seeks the same relief, and is entitled to the same remedy in respect to that judgment.

2. The plaintiff Morey claims title to a lot in Lansingburgh, under a purchase upon execution against John Morey, who held under a lease of the defendant Bates, given in 1804, and he seeks to be relieved against the operation of a mortgage covering the same lot, and given by Bates to the defendant Lansing in 1802.²

3. This case, then, turns wholly upon the question whether the mortgage of 1802, from Bates to Lansing was, at the time of filing

¹This short statement of facts is condensed from the pleadings set forth in the report.

²The opinion relating to the claim of this plaintiff, viz.: that defendant Lansing is estopped by his dealings with this plaintiff from setting up the mortgage as to him, is omitted. The learned Chancellor reaches the conclusion that there is no estoppel.

the bill, to be deemed a valid subsisting mortgage for any part of the debt originally secured by it. In this question the plaintiffs Brinckerhoff and Morey are equally interested, for they both hold, by purchase under Bates, parts of the land covered by Lansing's mortgage.

It does not appear to me that the claim under this mortgage ought to be affected by other transactions totally distinct from it; any fraudulent pretensions of Lansing, under either of his judgments, are not to destroy his rights under the mortgage; it must stand and be investigated upon its own merits.

There is no doubt of its having been a fair, valid mortgage in the beginning, and given to indemnify Lansing, as endorser of a note drawn by Bates for 1,500 dollars. The only proper inquiry now is, Has Lansing been injured, and is he entitled to any indemnity for the injury he received by means of that note?

The proviso in the mortgage was, that Bates was to pay to Lansing 1,500 dollars with interest, "according to the condition of a certain bond, or writing obligatory, bearing even date therewith, executed by Bates to Lansing as a collateral security." The bond here referred to was, according to the condition of it, "to pay 1,500 dollars, with lawful interest, on or before the 7th of March, 1803, or keep the defendant L. harmless, and pay up the note endorsed by the defendant L. for the defendant B., in the Farmers' Bank, when the same should be called for."

The note referred to, in the condition of the bond, was of the same date with the bond and mortgage, and was for 1,500 dollars, payable in fifty-six days, and discounted at the Farmers' Bank, in favor of Bates. It appears by the testimony of L. I. Tillman that the note was renewed at the end of the fifty-six days by a new note made and endorsed in like manner, and so it continued to be renewed *loties quoties*, for a number of years. The calls were all paid, from time to time, by Bates, and the sum was reduced gradually, at times, to 900 dollars, to 700 dollars, to 600 dollars, and at one time to 400 dollars, and then it was raised again, on the renewal, to 1,000 dollars, and at one time to 1,300. The debt of 1802 was kept alive in the bank by these constant renewals and alternate variations in the sum until the 8th of October, 1811, when the sum was reduced to 720 dollars, and the note then alive, and for that sum, was protested for non-payment. This catastrophe put a stop, according to the usual mercantile phrase, to the running of the note in the bank, and the defendant Lansing, as endorser, was obliged to take up and pay the note, which he did by a note of his own, as drawer, endorsed by the defendant Adams.

I see no good reason why the bond and mortgage should not

stand as an indemnity and security for the 720 dollars, which Lansing was thus obliged to pay.

The bond was intended as an indemnity against the bank debt, originally created by the loan upon the note for 1,500 dollars, so long as that bank debt should continue, under the customary renewals and fluctuations in the amount. The 1,500 dollars were, by the bond, made payable in six months; this fact shows that the parties contemplated a continuation of the debt beyond the fifty-six days, for which the original note was made payable. It was evidence of an expectation that the note was to be repeatedly renewed. The other part of the condition of the bond, that the defendant Bates was to pay the note in the bank "when the same should be called for," shows, also, the like expectation. Instead of fixing at the precise period when the first note was made payable, as would have been done in any other case, the parties adopt the loose commercial phrase applicable to a note running in the bank, and evidently allude to the calls for partial, and for final payment, to be made on the part of the bank. There is no doubt that this construction of the instrument is according to its true meaning; and the mortgage continued a subsisting and valid security so long as the debt created in September, 1802, was kept alive in the bank, either in whole or in part, by these customary renewals. The mortgage, with its accompanying bond, fairly disclosed the nature of this continuing security, and no imposition was, or could have been, practised upon any subsequent purchaser or mortgagee who would be at the pains to examine into the state of the debt disclosed by the bond and mortgage. The mortgage itself disclosed the nature of the debt secured by the bond, when it stated that the bond was taken as a collateral security. Such a security for such a debt might subsist indefinitely; but what concern has the purchaser, or subsequent encumbrancer, with the nature of the security, provided there be no false lights held out, and he be, by the registry, timely and duly informed of the character of the lien?

The only objection of any force to the validity of the mortgage as a security for these renewed notes is, that the notes were occasionally increased, which might seem to be so far the creation of a new debt. But I apprehend such an occasional increase of the debt, on the periodical renewal, provided the debt was kept within its original limits, did not change the character of the debt or affect the security. It is not so understood in the commercial world, and was not so intended by the parties to the mortgage; and an increase of the sum on a renewal was no more than a return of some of the calls made on the former renewals. The identity of the debt remained, so as to preserve the relation between that and the pledge.

It would be dangerous and unjust, as between the parties, not to allow the whole note so renewed to come under the protection of the mortgage. There was nothing here like the novation of the civil law. There was no new debt created differing in quality or character, or relation or security. It was according to mercantile and bank usage (in reference to which the bond and mortgage were given) a renewal or continuation of the same debt, under the same circumstances, and subject only to those fluctuations in amount which are customary in such bank operations.¹

I shall, therefore, decree: 1. A perpetual injunction in favor of the plaintiffs B. and W. against any execution or other proceeding, on the judgment confessed by Bates to Lansing, and docketed on the 3d of April, 1806, and that entry of satisfaction of record of that judgment be made by the defendant Lansing.

2. That unless the plaintiffs B. and M., or one of them, bring into court and deposit with the register, for the use of the defendant L., within thirty days, the sum of 720 dollars, together with lawful interest thereon from the 8th day of October, 1811, unto the day of bringing in the same, the injunction heretofore issued, in respect to any proceeding under the bond and mortgage in the pleadings mentioned, be thereafter dissolved, so far as to allow the defendant L. to demand and collect under it, or by virtue of it, the sum of 720 dollars, with interest from the 8th day of October, 1811, until the money shall be paid and the costs and charges of all necessary proceedings thereon.

3. That the bill, as to the defendant B., be dismissed, and that unless the plaintiffs B. and M. shall within thirty days elect to proceed against the defendant A., to enforce his proportion (if any) of contribution to the said debt and interest so declared due to the defendant L., and give notice of such election to the solicitor for the defendant Adams, that then the bill as to him shall stand dismissed.²

Decree accordingly.

¹The rest of the opinion, relating to other aspects of the controversy between the parties, is omitted.

²*Choteau v. Thompson*, 3 Oh. St. 424 (1854); *McGuire v. Van Pelt*, 35 Ala. 344 (1876), *accord*. But see *Jarnagan v. Gaines*, 84 Ill. 263 (1876).

BUTLER v. MILLER.

COURT OF APPEALS OF NEW YORK, 1848.

(1 N. Y. 496.)

This was an action of trover brought in the Supreme Court by Butler and Vosburgh against Miller for a number of horses, cattle and hogs, and a quantity of farming utensils, and other property. The cause was first tried before Cushman, late Circuit Judge, at the Columbia Circuit, in September, 1843, when a verdict was had for the plaintiffs, which was set aside by the Supreme Court and a new trial ordered. (See 1 Denio, 407.) A second trial was had before Parker, Circuit Judge, in March, 1846, and on that trial the case was as follows:—

The plaintiffs gave in evidence a chattel mortgage upon the property in question, executed to them by one Abraham B. Vanderpoel, dated April 19, 1842, which had been duly filed in the proper town clerk's office. The instrument recited that Vanderpoel was indebted to the plaintiffs in the sum of \$498.72, being the amount of three promissory notes made by Vanderpoel, and held by the plaintiffs, and the mortgage was to become void if Vanderpoel should pay the debt by the first day of October then next. Evidence was given tending to show a just consideration for the notes. At the time the mortgage was given the property was on the farm of the mortgagor, and was used by one Mosher, who worked the farm on shares, under an agreement by which Vanderpoel was to furnish teams, stock and utensils. After the mortgage was given the property remained on the farm, and was used as before. On the 15th day of July, 1842, the defendant, as sheriff of the county of Columbia, sold the property in question by virtue of an execution against Vanderpoel, in favor of the Lafayette Bank, which was delivered to the sheriff on the 5th of May, 1842. The evidence tended to show that the plaintiffs asserted their claim under the mortgage at the sale, and forbid the sale.

It also appeared that on the 7th of May, 1842, the plaintiffs took from Vanderpoel a bond and warrant of attorney for the amount of the notes secured by the mortgage, upon which judgment was entered in the Supreme Court on the same day, and execution thereon was, by Vanderpoel's consent, issued immediately to one of the deputies of the sheriff aforesaid. It was also proved, after objection duly made and exception by the defendant's counsel, that it was agreed between the plaintiffs and Vanderpoel that the judgment should be taken as collateral to the mortgage.

The plaintiffs' execution, soon after it was issued, was levied upon the property in question, and the property was advertised for sale both under that execution and the one above mentioned in favor of the Lafayette Bank.

It also appeared that after the sheriff's sale above mentioned the plaintiffs made a motion in the Supreme Court for an order requiring the defendant, as such sheriff, to apply the proceeds of the sale on the judgment and execution in their favor. This motion was based upon an allegation that the execution of the Lafayette Bank, when first delivered to the sheriff, was directed to the sheriff of the county of Hudson (there being in fact no such county), and that the error was corrected and the execution redelivered to the sheriff after the execution of the plaintiffs was issued. The motion was denied with costs.

The defendant's counsel requested the Circuit Judge to decide and charge the jury: 1. That the mortgage under which the plaintiffs claimed was fraudulent and void as against the judgment and execution of the Lafayette Bank. 2. That the judgment taken by the plaintiffs on the 7th of May, 1842, for the same notes secured by the mortgage, merged the notes and extinguished the lien of the mortgage. 3. That the issuing of execution upon that judgment, the levy upon the mortgaged property, and the motion to the Supreme Court to have the proceeds of the sheriff's sale applied upon that execution, were severally acts inconsistent with any claim under the mortgage, and destroyed all right to assert any such claim.

The Circuit Judge ruled that the question of fraud was one of fact for the jury to decide. That the judgment was not a merger or extinguishment of the mortgage, if it was taken as collateral merely; if not so taken, then that it was a merger. Upon the 3d proposition he refused to charge as requested. The defendant excepted, and the jury gave their verdict for the plaintiffs. The defendant moved in the Supreme Court for a new trial on bill of exceptions, which was granted by that court. The plaintiffs appealed to this court under the judiciary act of December, 1847.

JOHNSON, J. The question of the *bona fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith v. Acker*, 23 Wend. 653.

The Circuit Judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The Judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the

judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the Supreme Court (1 Denio, 407) when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.¹

It may, perhaps, well be doubted whether the judgment was a security of a higher nature than the personal mortgage; and, even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had acquired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land and gives the mortgagee no title or estate therein whatever. Whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities—certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution.

Although it is clear that the notes were merged in the judgment by operation of law, it does not, as I think, certainly follow that all the collateral securities would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand, especially titles to property acquired under instru-

¹ If then the judgment was intended as a collateral security to the notes and mortgage before executed, it would be clear that the notes and mortgage were not merged in or extinguished by the judgment, but remained a valid conveyance under which the plaintiffs could make title to the property mortgaged and sustain their action. [But] the judgment, which is a higher security than the notes and mortgage, or either of them, was between the same parties. It was, so far as the plaintiffs, the mortgagees, are concerned, for the same debt, and this appears on the face of the securities. Does not the law presume that the judgment was taken in satisfaction of the original debt? I am of opinion that it does."—*Per Jewett, J., in opinion in the Supreme Court (pp. 412, 413).*

ments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the state or condition of the debt itself, and means no more than this—that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their vitality. It has never been applied, and I think never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone. This most obvious and rational distinction seems to have been overlooked by the Supreme Court in the opinion to which I have referred.

It is unnecessary, however, to decide the question here discussed, as it was put to the jury substantially to find whether it was agreed or intended by the parties in entering up the judgment to cancel the mortgage; and I admit that if such had been the agreement and intention, there was sufficient consideration to support it, and that the mortgage must have yielded to the superior force of the agreement, whether express or implied.

The jury have determined by their verdict that the parties to the mortgage did not intend to cancel it, and that notwithstanding the judgment it remained a valid subsisting security.

Thus far, then, it seems to be established by the verdict that, at least up to the time of the execution being placed in the hands of the sheriff by the plaintiffs, the mortgage was a valid instrument in their hands, and vested in them the legal title to all the property it purported to convey, subject to be defeated only by payment and satisfaction, or voluntary waiver or surrender.

It remains to be seen whether the plaintiffs have in any way divested themselves of their title to the property thus acquired, or been guilty of any acts which would authorize the court to estop them from asserting their rights under the mortgage.

[The learned Judge examines this question at length, and comes to the conclusion that the plaintiffs have, by pursuing their remedy under the judgment, so dealt with the property in question as to preclude themselves from setting up their title to it under the mortgage.]

New trial granted.

BUSH v. COOPER.

HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI, 1853.

(26 Miss. 599.)

On appeal from the Superior Court of Chancery: Hon. Stephen Cocke, Chancellor.

The bill was filed by the appellee, as administrator of Maborn Cooper, deceased, for the purpose of subjecting lot No. 1 in square No. 9, in the suburb of St. Mary, of the town of Port Gibson, to the payment of two judgments held by the intestate of appellee Bush. The bill alleges that the firm of J. O. Pierson & Co., consisting of J. O. Pierson and the appellant, with Eli C. Briscoe as their surety, on the 16th April, 1839, executed two promissory notes to W. T. and T. B. Dyer, one due in November, and the other in December, 1839. That on the 17th March, 1840, the said J. O. Pierson & Co., in consideration that the said Dyers would extend the time of payment of said notes, executed to E. C. Briscoe and George W. Elmer, as trustees, a deed of trust, in and by which they conveyed said lot 1, in square 9, to said trustees to secure the payment of said notes. That subsequently the two Dyers obtained judgments on said notes, and that on the 23d January, 1845, they sold and transferred said judgments, notes, and deed of trust to Maborn Cooper for \$1,000, and that no part of said judgments has been paid. The bill then sets forth and attacks a sale of said property, under a judgment of *Thomas et al. v. J. O. Pierson & Co.* The bill then alleges that Pierson and Bush are discharged bankrupts, and that Briscoe is insolvent, and that the only hope of making any thing rests upon the deed of trust.

The bill then alleges that on the 21st October, 1844, said lot 1, in square 9, was sold at sheriff's sale, under a judgment rendered in June, 1838, in favor of Nelson, Carleton & Co. against J. O. Pierson & Co. and others, and purchased at said sale by the appellant Bush for \$1,033. It is then charged that Bush, the appellant, ought to have advanced the money at once for the protection of said property under the deed of trust; that his purchase is fraudulent and void, or at any rate that it enures to the benefit of the deed of trust.

Bush, the appellant, admits in his answer the making of the notes, and the execution of the deed of trust. He then sets up and pleads his discharge as a bankrupt, on the 20th February, 1843, and files his certificate of discharge, as exhibit No. 1, to his answer. He admits his purchase of said property at sheriff's sale on the

21st October, 1844, and relies on the sheriff's deed to him. He avers that he paid for said property with money acquired by him since his discharge in bankruptcy, and claims title to it against all the world.

The court below sustained the prayer of the bill, and Bush appealed to this court.

Mr. Justice HANDY delivered the opinion of the court.

This bill was filed by the appellee in the Superior Court of Chancery, to foreclose a deed in trust executed by the appellant on the 17th March, 1840, conveying certain real estate in the town of Port Gibson to trustees to secure the payment of two promissory notes made by the appellant, and afterwards transferred to the appellee. The facts necessary to be taken into view in considering the questions presented for determination are as follows:—

The notes secured by the trust deed were due in January and February, 1841; and in November, 1842, a judgment at law was rendered upon them against Bush, which judgment and the deed in trust were afterwards transferred to the appellee, and remain unpaid. The deed, in conveying the property, contains the words "grant, bargain, and sell," but contains no other covenant of warranty in express terms.

The appellant was discharged as a bankrupt in February, 1843; and in October, 1844, he purchased the property embraced in the deed in trust at sheriff's sale, under an execution on a judgment rendered in June, 1838, against the appellant, and which was unsatisfied, for the sum of \$1,033, by means acquired by him after his discharge as a bankrupt; and in virtue of that purchase, he now claims to hold the property by title paramount to the lien of the deed in trust. On the contrary, the appellee claims that the property is subject to the payment of the debt secured by the deed in trust, notwithstanding the discharge of the appellant as a bankrupt, and that the appellant's purchase, under the prior incumbrance, cannot be set up by him to defeat the security of the deed in trust.

The first question to be settled is, whether the discharge of the appellant from the debt, by his certificate as a bankrupt, extinguished the deed in trust.

It is insisted on his behalf that the deed was but a mere incident to the debt, and that whatever discharged the debt necessarily destroyed the deed, because the security could not exist where the debt, which was its foundation and support, was discharged. This is undoubtedly well sustained by modern decisions, as a general rule, but it is not without exceptions. It is held to apply in all cases where the debt has been actually paid, or where it was

not supported by a valid legal consideration, or where the debtor *ex æquo et bono* is discharged from its payment. But it is held not to apply to a case where an action upon the debt has been barred by the statute of limitations, and that the creditor may proceed to foreclose his mortgage, notwithstanding the bar of the debt by the statute. (*Miller v. Helm*, 2 S. & M. 697; *Miller v. Trustees of Jefferson College*, 5 Ib. 650; *Bank Metropolis v. Guttschlick*, 14 Peters, 19; *Thayer v. Mann*, 19 Pick. 535.)

In addition to this, the objection is fully met by the second section of the bankrupt act of Congress of 1841, which provides that "nothing in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal," &c. From this it is manifest that, while the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property, was left in as full force as though the debtor had never been discharged from the debt, for the security of which the lien was made.

The second question, then, presented is, Whether Bush is estopped by the deed from setting up his title acquired under the judgment, which was a lien existing at the date of the deed, in opposition to the title conveyed by the deed? This is a question of great importance in its direct and collateral bearings, and it has been carefully considered by the court.

[The Court then discusses at length the question of the effect of the appellant's discharge in bankruptcy upon the estoppel arising from the covenants in his deed of trust, and concludes as follows:]

It follows from this view of the subject that the appellant was not discharged from his covenants in the deed, and consequently that he is estopped from setting up his subsequently acquired title against the claim of the appellee. As a legal proposition this conclusion is well sustained by expositions given to the bankrupt laws by very high authorities. In an equitable point of view, the position of the appellant would not be more favored. After having pledged the property as a security for the payment of the debt, he would scarcely be heard, in point of mere equity, to set up a claim to the same property, founded on the existence of a prior lien which he had covenanted against, and thereby deprive his creditor of the security he had given, and appropriate the property to himself.

The decree of the chancellor is affirmed.¹

¹*Chamberlain v. Meeder*, 16 N. H. 381 (1844).

PRATT v. HUGGINS.

SUPREME COURT OF NEW YORK, 1859.

(29 Barb. 277.)

This was an action to foreclose a mortgage upon premises in Greene county, dated February 5, 1835, executed and delivered by the defendant, William T. Huggins, to Joseph Huggins, to secure the sum of \$250, payable on the 1st of February, 1836, and assigned by the latter to the plaintiff on the 14th of March, 1836. The mortgage was on the same day acknowledged, and on the 9th day of February recorded in the clerk's office of the county of Greene. Contemporaneously with the mortgage and to secure the same debt, William T. Huggins executed and delivered to said Joseph Huggins a promissory note of like date, amount and time of payment as the mortgage, and payable to Joseph Huggins or bearer. The mortgage was under seal, and the note was not under seal. The defendants, among other things, averred that the note was paid and satisfied, and also that the note (and consequently the mortgage) was barred by the statute of limitations, by the failure to commence an action thereon within six years after the cause of action accrued. The action was commenced on the 6th day of September, 1855. The cause was tried by the Hon. Deodatus Wright, then a justice of the Supreme Court, without a jury, at a Circuit Court held in the county of Greene in November, 1857. Evidence was given tending to show the consideration and object of the bond and mortgage, and on the part of the defendants, to show that they were satisfied and paid; and on the part of the plaintiff, that an unpaid amount of about \$70 remained due thereon. The justice came to a conclusion favorable to the plaintiff on the latter point, he finding that a portion of the amount secured by the mortgage was still due and unpaid; but holding, also, that the right to recover was barred by the statute of limitations, he gave judgment for the defendants, with costs; from which judgment the plaintiff, having duly excepted to the rulings of the judge, appealed to the General Term. The remaining facts, so far as they are material, sufficiently appear in the opinions which follow.

HOGEBROOM, J. The facts of this case lie within a narrow compass. The plaintiff, by action commenced in 1855, seeks to foreclose a mortgage under seal, executed in 1835, for a debt falling due in 1836, which mortgage was accompanied by a promissory (unsealed) note to secure the same debt. The mortgage contains no covenant to pay, but the condition is that the instrument shall

be void if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defenses; and among others, the defense of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question whether a debt secured by a sealed mortgage and an unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case," the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been paid? or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, conclusive evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal bar to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned? If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract and must be brought within six years. (Code, § 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note. The mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only ques-

tion would be, was there a debt remaining unpaid—a security upon real estates—and was the lien enforced during the period that the law gives it legal existence? The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the principal, and the mortgage only the incident; that is, that it is given only as a security for the note. In a certain sense, this is true. But in fact the debt itself is the principal thing, and the note is one form of security for, or evidence of, the debt, and the mortgage another. Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bona fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well-defined limits of the statute itself. The case of *Jackson v. Sackett*, 7 Wend. 94, is much relied on as decisive authority in support of the bar. That was ejectment upon a forfeited mortgage, secured also by a note. The tenor of Mr. Justice Sutherland's able opinion is towards regarding the lapse of six years, unexplained, as sufficient evidence of payment. But he held that the bar was not absolute, and that circumstances tending to show that the note was unpaid were proper for the consideration of the jury, and a new trial was in fact granted for withdrawing the case from the jury. We are not precisely apprised by the case at bar what circumstances here exist; but we are told in the case itself that the plaintiff gave evidence "tending to show that there was due upon the mortgage about the sum of \$70; that no part of the said sum, or the interest thereon, had been paid." And the judge also says, "I am entirely satisfied from the evidence that there is an unpaid balance due on the note, and should have decided in the plaintiff's favor, except for the legal bar above stated." The late chancellor (Walworth) doubts, and even denies, the authority of the last cited case, in *Heyer v. Pruyn*, 7 Paige,

465, and goes so far as to say that it "cannot be law." The cases in Massachusetts and Connecticut, and one in Kentucky, hold that notwithstanding that "the note may be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage." (*Thayer v. Mann*, 19 Pick. 535; *Bush v. Cooper*, 26 Miss. [4 Cush.] 599; *Eastman v. Foster*, 8 Mete. 535; *Baldwin v. Norton*, 2 Conn. 163; 14 B. Monroe [Kentucky], 307. See also 2 Cox's Chancery Cases, 125; *Spears v. Hartly*, 3 Esp. R. 81, 2; Hilliard on Mortgages, 21, 22.) The case of the *Bank of the Metropolis v. Guttschlick*, 14 Peters, 19, declares a kindred and nearly analogous principle. The case of *Waltermire v. Westover*, 14 N. Y. R. 16, has also, particularly in the reasoning of Mr. Justice Selden, some bearing upon the present case. In that case the lien of a justice's judgment, which according to the statute would be barred after six years for the purpose of bringing an action thereon, was, when a transcript was filed in the county clerk's office, recognized as of equal validity and duration with that of a judgment originally entered in the common pleas, and extended to ten years as against subsequent creditors. It is true much stress was laid upon the language of the statute giving such a judgment the same force and effect as a judgment of the common pleas, but much stress was also laid upon the fact that there was nothing to prevent the enforcement of such a lien, except the language of the law of limitations; and it was considered that that language might be appropriately limited to cases directly within its terms; that there was reason for saying that the debt still remained, notwithstanding the statute had cut off the remedy when resorted to in the shape of an action. A distinction was drawn between the institution of a suit upon the justice's judgment and the enforcement of it as a lien upon real estate; and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability and an action upon the mortgage for the purpose of enforcing the lien upon the real estate. This question, in this State, may be said to be nearly *res nova*, and I feel authorized to follow the weight of judicial authority elsewhere, resting, as I think it does, upon principle, especially as the case in 7th Wendell is not directly hostile to the rule here suggested. The judgment should be reversed and a new trial granted, with costs to abide the event,

GOULD, J. At the December term, 1858, this case was submitted upon briefs, without oral argument. And on that submission I wrote this brief opinion:

"The mortgage is defeasible on condition that \$250 be paid. The statute of limitations effects not the right to the money, but the

remedy therefor. It says to the creditor, not 'you are paid,' but 'you cannot call upon a court of law to enforce payment.' And the defense in this case is, not that the mortgagor has complied with the condition, but that, if he were sued at law on the note, the statute of limitations could be interposed as a legal bar to a recovery. Very true; but he is not sued on the note, and the plea (by answer) does not pretend that he has performed the condition; which, and which only, would defeat the mortgage-title. He does not bring himself within the equity of the defeasance; and the title remains good, under seal, it is asserted, within twenty years, and it can be defeated only according to the tenor of the defeasance. This view is sustained in *Heyer v. Pruyn*, 7 Paige, 465, and is precisely and very satisfactorily covered by the case of *Thayer v. Mann*, 19 Pick. 535. There should be a new trial."

As this opinion was thought to overrule the case of *Jackson v. Sackett*, 7 Wend. 94, my associates deemed it best to have a full argument before coming to such a result; and on such argument it now comes up.

My views remain unchanged, and though it is rather difficult to say what the case of *Jackson v. Sackett* did decide, still, if to order a new trial in this case that case must be reversed, I should order the new trial. That case founds its reasoning on the basis that the statute of limitations is a defense, because the law, from lapse of time, presumes payment. I do not so understand the statute of limitations. I understand mere lapse of time to be a full defense, because the statute says so: *Ita lex scripta*; and there is need of no such presumption to help out an absolute rule. But that case departs from its premise of presumption of payment being merely the basis of a positive statute bar, when it says (at p. 100), "but the presumption arising from lapse of time is but evidence to the jury, from which they may infer that the debt has been satisfied." This, though true on a question of fact (as to actual payment), cannot be said of a legal presumption arising from an admitted fact. The lapse of time was either a bar or no bar. If, by the statute, a bar, it needed no help from presumption. If not, by the statute, a bar, no presumption could help it.

But since my first opinion was written there has been published a decision (given indeed in 1857, but not then printed) by which the Court of Appeals clearly takes the view that I did. (*Waller-mire v. Westover*, 4 Kern. 16.) At page 20, "such statutes act upon the remedy merely, and not upon the debt." And at pages 21, 2, "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that this statute, which is in terms confined to the

remedy by action, operates to annihilate a remedy by execution? The statute does not operate by producing any presumption of payment, but is a mere statutory bar, founded in principles of public policy."

In the case before us, the statute of limitations (where it speaks of the lapse of six years as a bar) is in terms confined to an action at law on the note, and cannot operate to annihilate a remedy on the mortgage, by which a court of equity cuts off the equity of redemption. The decision in 4th Kernan is abundant authority for ordering a new trial in this case.

The judgment of the circuit court should be reversed and a new trial ordered, costs to abide the event.¹

WRIGHT, J., concurred.

New trial granted.

BORST v. COREY.

COURT OF APPEALS OF NEW YORK, 1857.

(15 N. Y. 505.)

On the tenth of August, 1837, the plaintiff and the defendant, Samuel Newkirk, as executors of the last will and testament of James Halliday, deceased, conveyed to the defendant, David P. Corey, a piece of land in Montgomery county for \$1,600, subject, however, to a mortgage thereon for about \$635, and this action was commenced August 5th, 1847, in the Supreme Court, on the equity side, to obtain a sale of the premises, by virtue of the equitable lien for the purchase price. The complaint in the action set forth the conveyance of the premises by the executors, alleged that no part of the purchase price had been paid by the grantee except the amount of the mortgage, and asked for a decree that the premises be sold and the purchase price and interest be paid from the proceeds of the sale. The complaint further alleged that the executor, Newkirk, had refused to join with the plaintiff in the commencement and prosecution of the action, and was therefore made a defendant.

The defendant, Newkirk, suffered the bill to be taken as confessed. The defendant Corey, by his answer, alleged that prior to the delivery of the deed to him he paid the purchase price of the land in full, except the amount of mortgage thereon, and had subse-

¹*Bellnap v. Gleason*, 11 Conn. 160 (1836); *Hulbert v. Clark*, 128 N. Y. 295 (1891).

quently paid the mortgage; and that he had not, at any time within six years next prior to the commencement of the action, been indebted to the executors or either of them, for or on account of the purchase price of the premises, or promised to pay the same; and that no cause of action had accrued for the same within the six years. To this answer a general replication was put in.

The action was tried before referees, and they found that more than six years had elapsed since the sale of the premises in question, prior to the commencement of the action, and decided that the plaintiff be nonsuited, on the ground that the cause of action, to enforce which the suit was brought, was barred by the statute of limitations. No bond or mortgage, or other written instrument, was taken to secure the payment of the purchase price of the land, and it does not appear that any credit was given therefor.

Judgment having been entered on the report, the plaintiff appealed therefrom; the Supreme Court, at general term, in the third district, affirmed the judgment, and the plaintiff appealed to this court.

BOWEN, J. The purchase price of the land in question was due and payable on the conveyance of the land to the defendant Corey, and as this action was not commenced until more than six years after the conveyance, and as no promise to pay was shown to have been made within six years, the statute of limitations would have been a complete bar to an action at law to recover the purchase price. (2 R. S. 295, § 18.)

This action, however, was one of equitable cognizance. At the time of the commencement of the action, the relief sought to be obtained in the manner applied for, that is, by a sale of the premises under the equitable lien thereon for the purchase price, could have been awarded by a court of equity only.

An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action, and a court of equity was resorted to solely for the reason that courts of common law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts which would constitute a defence to the action at law would also be a defence to this action, unless the statute of limitations be an exception.

So, too, the cause of action, to wit, the non-payment of the purchase price of the land, is the same, whichever court is resorted to.

It is true that, to sustain the suit in equity, the plaintiff must

bring to his aid the equitable lien given by law, while the action at law can be sustained without reference to such lien. But the lien is merely an incident to, and must stand or fall with the debt. The debt is the basis or foundation of the lien. The latter cannot exist without, or independently of the former. In the suit to enforce the lien, the cause of action, and the only substantial cause of action, is the debt.

The forty-ninth section of the title of the Revised Statutes entitled, "Of the time of commencing actions" (2 R. S. 301), provides that "whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this title, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits hereafter to be brought for the same cause in the Court of Chancery."

I do not see why this case does not come within the letter of the above provision. It certainly does, if I am right in supposing that the defendant's indebtedness for the purchase price of the land constitutes, in the language of the statute, the plaintiff's "cause of action."

It is claimed by the plaintiff's counsel that if the language of the forty-ninth section is sufficiently broad to include this case, the fiftieth section excepts it therefrom. This section provides that "the last" (§ 49) "section shall not extend to suits over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in the courts of common law."

The term "subject matter" of suits, as used in this section, is synonymous with the term "cause of action," contained in the preceding forty-ninth section. No other definition can be given to the phrase as applicable to this case. It is said that "the subject matter" of this suit is the equitable lien, of which a court of law cannot take cognizance; while, if a suit at law had been brought to recover the purchase price of the land, "the subject matter" of the action would have been the debt. But, as before shown, the lien is a mere incident to the debt, being given solely to secure its payment. If the lien can be said to be, in any sense, the "subject matter" of this action, it is so merely as incidental to the debt, the latter being the principal and fundamental "subject matter" of the suit, as much so as it would be of an action at law to recover the debt. I do not think that the fiftieth section excepts this case from the operation of the previous section.

Prior to the Revised Statutes there was no statute in this state limiting the time for commencing actions in courts of equity. Yet,

previously to the adoption of those Statutes, it was frequently held that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defence to the action in equity as to one at law; not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute. (*Roswell v. Mork*, 6 John. Ch. R. 266; *Kane v. Bloodgood*, 7 *id.* 90; *Murray v. Coster*, 20 John. 576; *Sanger v. De Meyer*, 2 Paige, 574; *Humber v. Trinity Church*, 7 *id.* 195; 24 Wend. 587; Story's Eq., § 529.)

I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation to actions at law constitutes a defence to this action. The provision of the Revised Statutes limiting the time of commencing actions in courts of equity was adopted as declaratory of the law as it then existed, and not as introducing a new rule. (3 R. S. 705, revisers' notes.)

It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

It has, however, been held that where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. (*Balch v. Onion*, 4 Cush. 559; *Thayer v. Mann*, 19 Pick. 535; *Elkin v. Edwards*, 8 Geo. 325; *Hoyer v. Pruyn*, 7 Paige, 465.)

But there is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage, to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract. On the contrary, the equitable lien is neither created or evidenced by deed, but arises by operation of law,

and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it.

It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt; it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce the lien. The *Mayor &c., of New York v. Colgate*, 2 Kern. 140, is relied upon by the plaintiff as an authority sustaining his position. That was an action for the collection of an assessment to defray the expenses of improving a street in the city of New York, under and by virtue of a lien upon certain lands in the city deemed to be benefited by the improvement, and upon which the assessment was made. The action was not commenced until more than six years after the assessment was made, and had become due and payable, and the six years' limitation was set up as a defence to the action.

The statute authorizing the assessment, and prescribing the remedies for its collection, provided that the sums thus assessed should be a lien or charge upon the houses and lots in respect to which the assessment was made, and might be sued for and recovered with costs, in like manner as if such houses and lots were mortgaged to the corporation for the payment thereof. The assessment was thus made, in effect, a mortgage with all its incidents, one of which was that payment was not to be presumed until the expiration of twenty years; and it was upon that ground that Judge Denio held that the six years' limitation did not apply, while Chief Judge Gardiner based his opinion on the ground that the assessment was in the nature of a judgment. In either view, the case is distinguishable from the one under consideration.

I think the judgment should be affirmed.

DENIO, C. J., delivered an opinion for affirmance upon substantially the same grounds as those stated by Bowen, J.

All the judges except *Brown, J.* (who did not vote), concurring in this opinion.¹

Judgment affirmed.

¹*Trotter v. Erwin*, 27 Miss. 772 (1854), accord. *Lingan v. Henderson*, 1 Bland. Ch. (Md.) 236 (1827), contra. And see *Hulbert v. Clark*, 128 N. Y. 295, 300, where it is said of *Borst v. Corey* that "the reasoning by which the result was reached in that case is not altogether satisfactory."

LORD v. MORRIS.

SUPREME COURT OF CALIFORNIA, 1861.

(18 Cal. 482.)

Plaintiff appeals.¹

FIELD, C. J., delivered the opinion of the Court, BALDWIN, J., and CORE, J., concurring.

The questions presented by the record for determination are: first, whether, when an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the Statute of Limitations, the mortgagee has any remedy upon the mortgage; and second, whether a party having a subsequent mortgage upon the same premises, executed after the statute has run against the note, can interpose the plea of the statute in a suit to foreclose the first mortgage, and thus secure a priority of lien for his subsequent mortgage. The facts of the case are these: On the fifth of May, 1855, the defendants executed to the plaintiff a mortgage upon the premises described in the complaint, to secure their promissory note to him of the same date, for the sum of four hundred dollars, payable in three months with interest. The mortgage is not set forth in the record, nor are its contents given. The complaint only alleges that it is of the premises in fee, and contains a clause authorizing the plaintiff, upon default in the payment of the note, to cause a sale of the premises in the manner provided by law, and to retain from the proceeds the amount of the note and interest. We shall assume, therefore, that it is in the common form in use in this State—that of an absolute conveyance, with a condition underwritten that it is executed as security for the note, and will become inoperative and void upon its payment at maturity; otherwise, remain in full force. The mortgage was duly recorded in the office of the Recorder of the county where the premises are situated, within two days after its execution. On the eighth of August, 1855, the note matured, and on the eighth of August, 1859, the period of limitation within which, by the statute, an action could be commenced upon it, expired. Subsequently to this, and on the eleventh of May, 1860, the defendants indorsed over their signatures, upon the back of the note, a memorandum to the effect that for value received they “renew, revive, and agree to pay” the note and debt. It would appear that subsequent to the execution of the mortgage, Morris, one of the defendants, disposed of his interest in the prem-

¹The opinion only is here given.

ises, for the petition of intervention, and the findings of the Court mention Goodman, the other defendant, and two other persons as being the successors of the defendants. We infer from this, and shall so assume in the consideration of the case, that these parties held the interest of the mortgagors in the premises, and it matters not for the purposes of the appeal in what mode the interest was acquired. Having such interest, they executed on the nineteenth of January, 1860, two mortgages upon the premises, one to the intervenors to secure their promissory note of the same date for \$4,894, payable on or before the fifth of June, 1860, with interest, and the other to one Polson to secure their promissory note to him for \$2,185, payable three months after date with interest. This last note and mortgage were assigned to the intervenors, and in July, 1860, both of the mortgages were foreclosed, and the usual decrees in such cases entered. In December, 1860, the present suit to foreclose the first mortgage was commenced, and the owners of the second and third mortgages filed their petition of intervention, alleging that the remedy of the plaintiff upon the note and mortgage to him was barred by the statute, and that the lien of the mortgage was extinct previously to the nineteenth of January, 1860, and if the note had been revived that such revival did not affect the extinct lien of the mortgage, or not in such manner as to give it any priority over the liens of the mortgages owned by them. The Court held that the liens of the intervenors must be first satisfied out of the proceeds of the mortgaged property, and the lien of the plaintiff be postponed until such satisfaction, and ordered judgment to that effect.

The Statute of Limitations of this State differs essentially from the statute of James I., and from the statutes of limitation in force in most of the other States. Those statutes apply in their terms only to particular legal remedies, and hence Courts of Equity are said not to be bound by them except in cases of concurrent jurisdiction. In other cases Courts of Equity are said to act merely by analogy to the statutes, and not in obedience to them. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts—that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes, where specialties are mentioned, as in the statutes of Ohio and of Georgia, the limitation is generally fixed either at fifteen or twenty years. The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It

is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Thus the statute requires an action "upon any contract, obligation, or liability founded upon an instrument of writing," except a judgment or decree of a Court of a State or Territory, or of the United States, to be commenced within four years after the cause of action has accrued. It matters not whether damages be sought for a breach of the contract, and thus an action at law be brought, or a specific performance be prayed, and thus a suit in equity be commenced: the proceeding must in either case be taken within the limitation designated. (See *Pearis v. Covilland*, 6 Cal. 617.) The statute, after prescribing certain periods within which actions upon judgments, upon simple contracts, for relief on the ground of fraud, and for other causes, shall be brought, declares in general terms that "an action for relief," not thus provided for, must be commenced within four years after the cause of action shall have accrued—covering all cases where equitable or other relief may be sought.

A mortgage in this State also differs materially from a mortgage at common law, or a mortgage in our sister States. At common law a mortgage of real property was regarded as a conveyance of a conditional estate, which became absolute upon condition broken. It gave to the mortgagee, except as otherwise stipulated by provisions inserted in the instrument, a present right of possession. Upon it the mortgagee could enter peaceably, or bring ejectment, or a writ of entry; and in those States where the common law view has been modified by considerations arising from the real object of the instrument and the nature of the transaction, it is still generally held that, as between the parties, it passes the fee and gives a remedy to the mortgagee for the possession, though as to third persons it constitutes only a lien or charge, and leaves the mortgagor the owner of the premises. Thus in *Kuer v. Hubbs*, 5 Met. 3, Chief Justice Shaw, in delivering the opinion of the Supreme Court of Massachusetts, after stating the object of a mortgage, said: "Hence it is that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor." And in the subsequent case of *Howard v. Robinson*, 5 Cush. 123, the same dis-

tinguished Justice said: "Although, as between mortgagor and mortgagee, it is a transmission of the fee which gives the mortgagee a remedy in the form of a real action and constitutes a legal seizin, yet to most other purposes a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor for most purposes the owner." The doctrine with respect to mortgages is very different in this State. Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to an action of ejectment, or to a writ of entry for their recovery. The language of the statute is express that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale. (See Pr. Act, sec. 260; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, *id.* 428; *Johnson v. Sherman*, 15 *id.* 293; *Goodenow v. Ewer*, 16 *id.* 464; *Boggs v. Hargrave*, 16 *id.* 563; *Fogarty v. Sawyer*, 17 *id.* 592.)

From this statement as to the Statute of Limitations, and the operation of a mortgage upon the right of possession in this State, it is evident that the decisions cited from the reports of other States, to the effect that a mortgagee has a remedy upon his mortgage after the Statute of Limitations has run upon the promissory note for the payment of which the mortgage was executed, have no application to the questions presented for consideration in the case at bar. Those decisions are founded upon distinctions made by the statutes of limitations of those States which do not exist in the statute of this State, or upon the right of possession which there accompanies the ownership of the mortgage. Thus in *Elkins v. Edwards*, 8 Geo. 326, which was a suit for the foreclosure of a mortgage, the Supreme Court of Georgia said: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years—the debt being unpaid." So in *Thayer v. Mann*, 19 Pick. 535, which was a writ of entry to recover possession of the mortgaged premises, the Supreme Court of Massachusetts said: "The creditor has a double remedy, one upon his deed to recover the land, another upon the note to recover a judgment and execution for the debt; and it does not follow that he cannot recover on one, although there may be some technical objection

or difficulty to his remedy upon the other." These decisions are no authority in the case under consideration, for the reasons already given, that the statute makes no distinction in the period of limitation between a simple contract in writing and a contract under seal, and a mortgage deed here does not confer any right of possession upon the mortgagee. It is undoubtedly true, as stated by the Court in the case from Georgia, that the creditor stipulated by contract for two remedies against his debtor to enforce the collection of his demand—the one by action upon the note, and the other by petition and foreclosure upon the mortgage. Similar remedies he can pursue in this State. He can proceed upon the note, and take an ordinary money judgment for the amount due; or he can sue in equity upon the mortgage, and take a decree for its foreclosure and the sale of the premises. The difference is, that here the limitation prescribed to the equitable suit is the same as that prescribed to the action at law. The mortgage is as much within the general designation of a "contract, obligation, or liability, founded upon an instrument of writing," as is the note itself.

We do not question the correctness of the general doctrine prevailing in the courts of several of the States, that a mortgage remains in force until the debt for the security of which it is given is paid. We only hold that the doctrine has no application under the Statute of Limitations of this State. A mortgage is a specialty, and is not within the terms of the English statute, or of the statutes of most of the States. An action founded upon such specialty can only be met by proof of payment. The payment may be established by direct evidence of the fact, and it may be presumed from the lapse of twenty years, when such presumption is not counter-vailed by evidence from the mortgagee. "Thus," says the Supreme Court of Maine in *Joy v. Adams*, 26 Maine, 333, "a mortgage security has not been deemed to be within any branch of the Statute of Limitations. He who would avoid such security must show payment; otherwise, the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred (*Thayer v. Mann*, 19 Pick. 535); but he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtedment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any counter-vailling considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption." The view thus stated is met by our statute, which embraces a mortgage security within its terms. Here

payment may be pleaded, and so may the statute itself without reference to the fact of payment.

Our conclusion, therefore, upon the first question presented is, that where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute, the mortgagee has no remedy upon the mortgage; that though distinct remedies may be pursued by him, the limitation prescribed is the same to both.

The second question is one of easy solution. The mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is as to the premises thenceforth a mere stranger. And if, instead of selling the premises, he execute a second mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created. But it is said that the plea of the statute is a personal privilege of the party, and cannot be set up by a stranger. This, as a general rule, is undoubtedly correct with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties. His grantees or mortgagees, with respect to the property, stand in his shoes, and can set up any defense that he might himself have set up to the action, either to defeat a recovery of the property or its sale. In the case at bar the defendant Morris had sold his interest in the mortgaged premises; and his grantees, with the other defendant, executed the second and third mortgages after the statute had run upon the note secured by the first mortgage. The subsequent revival of that note continued the personal liability of the defendants. Whether it also revived the mortgage executed by them it is unnecessary to express any opinion, as the defendants do not appeal from the decree. The revival could not affect, and did not affect, the previously acquired liens of the second and third mortgages upon the property; and the intervenors holding those mortgages could interpose the statute to the enforcement of the first mortgage, so far at least as to secure a priority in their liens over that mortgage. The ruling of the Court below, therefore, in postponing the lien of the first mortgage, assuming that the lien was revived, to the liens of the subsequent mortgages, was clearly correct.

*Judgment affirmed.*¹

¹But that the mortgagor is not entitled to affirmative relief, see *De Cazara v. Oreña*, 80 Cal. 132 (1889).

HARRIS v. MILLS.

SUPREME COURT OF ILLINOIS, 1862.

(28 ILL. 44.)

The facts of this case are stated in the opinion of the court by Mr. Justice Walker; the same case was before the court at a prior time, and will be found reported in volume 25 of these Reports, at page 165.

The decree appealed from was rendered by Hollister, Judge, at the October term, 1861, of the Marshall Circuit Court.

WALKER, J. This bill was exhibited to foreclose a mortgage, given to secure a note alleged to have been lost. The mortgage bears date the 12th of May, 1837, and recites a note for seven hundred dollars. The note is alleged to have been given on the 9th of April, 1836, by Edwin Mills to appellant, due on the 9th day of September, 1838. The mortgage was not recorded until the 8th day of November, 1855, and appears never to have been acknowledged. It also appears that Edwin Mills, on the 13th day of January, 1839, executed a mortgage on the same land to secure two thousand dollars to Harlow Mills, for indebtedness due to him. This latter mortgage was acknowledged and recorded. Edwin Mills, on the 17th day of February, 1842, conveyed the mortgaged premises to Harlow Mills for the expressed consideration of two thousand dollars. This deed was recorded on the 4th of August, 1842, in the proper office.

The bill charges that this deed and mortgage, from Edwin to Harlow Mills, are without consideration, and are fraudulent and void. It is also charged that they were taken by Harlow with full notice of appellant's prior mortgage. The answer alleges that a consideration was given, and denies all notice of the prior mortgage. The answer also sets up, and relies upon, the lapse of more than sixteen years after the maturity of the note and before the exhibition of the bill, as a bar to a foreclosure. On the hearing, the court below dismissed the bill and rendered a decree against complainant for costs, to reverse which he prosecutes this appeal.

The principal question presented by this record is this: the statute of limitations having barred a recovery by suit on the note, does it form a bar to a foreclosure of the mortgage by bill in equity? Had this been an action on the note, over sixteen years having elapsed after the maturity of the note, the recovery would have been barred. If such an action had been instituted, and a recovery defeated, the judgment could have been interposed

as a successful bar to a foreclosure. Or, had an ejectment been brought, and the bar of the statute allowed to defeat a recovery against Harlow Mills or those holding under him, the judgment might also have been relied upon to prevent a decree of foreclosure. Or, had a *scire facias* been sued, and had the statute of limitations been successfully interposed to defeat a recovery, the judgment might have been pleaded to avoid a foreclosure by bill. When the party has elected one of several remedies, and it results in a judgment against the mortgagee, that judgment becomes as complete a bar to a proceeding in a different form for a foreclosure as payment, release, or other discharge.

The question, however, still recurs, whether, after several remedies have been barred, but not established in a legal proceeding, the bar may be relied upon in other and different remedies? As a general rule, courts of equity follow the law in allowing the defense of the statute of limitations. A bar of the statute, at law, forms a bar in equity. (Story's Eq. Pl., § 500, § 751.) In equity, as at law, an acknowledgment that a debt is due, and a promise to pay it, will take it out of the operation of the statute. If the mortgagor is permitted to remain in possession twenty years after a breach of the condition, the right to file a bill to foreclose will be generally considered as barred and extinguished. Though in cases of this description, as the law is not positive, but is based upon presumption of payment, it is open to be rebutted by circumstances. (2 Story's Eq., § 1028, b.) This court has repeatedly held, in conformity to the general doctrine announced by the adjudged cases, that the debt is the principal thing and the mortgage is the incident. That the latter follows the consideration of the former. That an assignment of the note operates *ipso facto* to transfer the mortgage. That a payment, release or other discharge of a note satisfies and releases the mortgage. If we are to be controlled by analogy, no reason can be perceived why a bar to a recovery on the note should not produce the same effect on the mortgage.

In Great Britain it is usual to insert in the mortgage itself a covenant for the payment of the money. When such a covenant is found in the mortgage, it being under seal, and the debt to secure which it was given is not, a bar to a recovery of the debt, if of a shorter period than a bar to a sealed instrument, could not affect the remedy on the covenant in the mortgage. If the statutory period necessary to bar an unsealed instrument be of shorter duration than a sealed instrument, a mortgage containing such a covenant given to secure the payment of a debt evidenced by an unsealed note would be governed by the longer period required to bar a recovery on sealed instruments. The mortgage in this case con-

tains no such covenant. This being so, renders the decisions of the British courts on mortgages containing such covenants, and given to secure simple contracts, inapplicable to this case. The statute having barred a recovery on the note, because according to the theory upon which the statute is based, the presumption is that the debt has been paid. There is no evidence in this record showing any promise to take it out of the operation of the statute. These statutes are, emphatically, statutes of repose. Without their aid litigation would never be barred, and titles and possession of property would never be quieted. By the efflux of time, the loss of evidence, the death of witnesses, and the failure of memory, were it not for the bar of these statutes, great injustice would result. These considerations have induced all civilized nations to adopt such laws, differing in detail and in the period necessary to operate as a bar, but all based upon the same principles and to attain the same object. Nor need such enactments work injustice. Persons under disability have allowed to them ample opportunity, after the disability ceases to exist, for the assertion of their rights, and those not under disability have also ample opportunity, within the period of limitation, to assert theirs. To avoid loss the creditor has only to use reasonable diligence, to avoid the bar of the statute.

It has been said that no length of time will bar a foreclosure by a mortgagee out of possession. This is placed upon the ground that the relation of landlord and tenant is supposed to exist between the parties. But such is not the true relation of the parties. For some purposes, and to a limited extent only, a portion of the incidents are the same. To a limited extent, and for some purposes, the relation of vendor and vendee, and trustee and *cestui que trust*, also exists. The relation which the parties bear to each other is peculiar to itself, partaking in some degree of the incidents of these other relations, but analogous in all particulars to no one of them. Whilst a tenant, until he surrenders the possession to the landlord, cannot rely upon the statute, yet the mortgagor, by acquiring an outstanding title and occupying the premises under it for the period, and upon the conditions imposed by the statute, may invoke its aid to prevent a foreclosure. Nor is he, like a tenant, required to account for rents and profits, bound to repair, nor is he impeachable for waste. Other courts have held, and such is clearly the weight of authority, that when the statutory period necessary to bar a recovery at law has elapsed, it will bar a foreclosure. (*Christophers v. Sprinke*, 2 Jacob and W. 231; *Jackson v. Wood*, 12 J. R. 242; *Giles v. Barrimore*, 5 J. R. 545; *Waterman v. Haskins*, *ibid.* 283; *Jackson v. Muers*, 3 J. R. 383; *Baker v. Evans*, 2 Car. S. R. 614; *Hugh v. Edwards*, 9 Wheat. 497; *Moore v. Cable*, 1 J. Ch. R. 385.) We are,

therefore, for these reasons, of the opinion that when the note became barred by the statute the right to foreclose also became barred, unless the mortgage had contained a covenant for the payment of the money, when it might be that it would require twenty years to produce that effect, as an ejectment would not be barred, under the general limitation law, before that period, unless it be under the seven year limitation acts. No error is perceived in dismissing complainant's bill, and the decree of the court below must be affirmed.¹

Decree affirmed.

¹*Pollock v. Maison*, 41 Ill. 516 (1866); *Newman v. DeLorimer*, 19 Ia. 244 (1865); *Schmucker v. Sibert*, 18 Kans. 104 (1877); *Lilly v. Dunn*, 96 Ind. 220 (1884); Ark. Dig. Stat. L. (1894), § 5094; Miss. Ann. Code (1892), § 2733; Mo. Rev. Stats. (1899), § 4276, *accord*. Compare *Von Campe v. City of Chicago*, 140 Ill. 361 (1892).

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